(13)

No. 88-1309

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Cross-Petitioners,

v.

JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; NADINE T., JANET T., ELLEN Z., HEATHER P., MARY J., SHARON L., KATHY M., and JUDY M., individually and on behalf of all other persons similarly situated; DIANE P., SARAH L., and JACKIE H.; MEADOWBROOK WOMEN'S CLINIC, P.A.; PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a nonprofit Minnesota corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF CROSS-PETITIONERS

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224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

92 pp

QUESTION PRESENTED

May a state constitutionally require a physician to attempt with reasonable diligence to notify the parents of an unemancipated minor under the age of 18 at least 48 hours before performing an abortion upon their daughter?

PARTIES TO THE PROCEEDINGS

The caption of the case contains the names of all parties to the proceeding.

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OPINIONS BELOW

The opinions below are set forth at pp. 10a-52a and 74a-109a of the Appendix filed with the *Hodgson, et al.* petition for certiorari in case No. 88-1125, which has been consolidated with this case. Hereinafter that appendix will be called "Hodgson Appendix."

The opinion of the district court is reported at 648 F. Supp. 756 (D. Minn. 1986).

The *en banc* opinion of the United States Court of Appeals for the Eighth Circuit is reported at 853 F.2d 1452 (8th Cir. 1988).

JURISDICTION

Jurisdiction has been asserted in *Hodgson, et al. v. State of Minnesota, et al.*, S. Ct. No. 88-1125, pursuant to 28 U.S.C. § 1254(1). Jurisdiction over this cross-petition is also proper pursuant to that section.

Cross-petitioners received copies of the Petition for Certiorari in *Hodgson v. State* on January 6, 1989. Pursuant to Rule 19.5 of this Court, this cross-petition was timely filed within 30 days after receipt of the petition for certiorari.

STATUTORY PROVISIONS INVOLVED

STATE LAWS

Minnesota Statutes § 144.343 (1988)

Minnesota Statutes §§ 260.133-.161 (1988)

Minnesota Statutes § 626.556 (1988)

(The text of these statutes is reprinted in the Appendix to this brief at A.1-A.38.)

STATEMENT OF THE CASE

I. The Statute.

In 1981 the legislature of the State of Minnesota enacted Act of May 19, 1981, ch. 228, Minn. Laws 1011, the so-called parental notification law, which is codified as subdivisions 2 through 7 of Minn. Stat. § 144.343 (1988) (A.1-A.4). Section 144.343 generally relieves minors of the requirement of parental consent for health services relating to alcohol and other drug abuse, venereal disease, and conditions associated with pregnancy, including abortion operations. With respect to abortions, however, the statute requires that parents receive prior notice of the impending abortion.

The notification requirement is contained in subdivision 2 of the statute which generally provides that physicians or their agents must attempt with reasonable diligence to notify the parents of an unemancipated minor under the age of 18 at least 48 hours before performing an abortion. Subdivision 4 provides that parental notice is not required when the parents have consented to the abortion, when prompt action is needed to preserve the life of the pregnant minor or when the minor reports that she is a victim of sexual abuse, neglect or physical abuse as defined in Minn. Stat. § 626.556 (1988).[1]

After providing for parental notification as described above, the Minnesota statute goes on to provide for an alternative to the notification requirement in the event that it were ever found to be unenforceable. Specifically, subdivision 6 of the statute provides that if subdivision 2 is ever enjoined by judicial order, then the same parental notice requirement shall

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[1] While the statute also provides for notice to the guardian or conservator of a woman who has been found incompetent by a court, this aspect of the statute was not challenged by plaintiffs or addressed by the courts below.

be effective together with an optional procedure whereby an unemancipated minor may obtain a court order permitting an abortion without notice to her parents upon a showing that she is mature and capable of giving informed consent to an abortion or, if she is not mature, that an abortion without notice to her parents would nevertheless be in her best interest. Section 144.343, subd. 6.

While Minn. Stat. § 144.343, subd. 2, does not contain an express statement of its purposes, its primary purposes are apparent from its language. These include the recognition and fostering of parent-child relationships, promoting counsel to a child in a difficult and traumatic choice, and providing for notice to those who are naturally most concerned for the child's welfare.[2]

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[2] These were among the goals of the author of the bill, Senator Waldorf, who when presenting the bill for the full Senate stated his reasons for the act, endorsing much of what was said by this Court in addressing a similar parental notification statute in *H. L. v. Matheson*, 450 U.S. 398 (1981). Among his reasons were the "longstanding position that the custody, care and nurture of the child reside first in the parents whose . . . guiding role includes counseling them on important decisions. These decisions include physical, emotional and spiritual health of the child. The parent, if he or she knows, can supply medical history, ensure an informed decision on the part of the minor and include the moral implications of the decision." Defendant's Exhibits (hereinafter "D. Exh.") 70-72, reprinted in the consolidated Joint Appendix (J.A.) at 502-07. The district court expressly found that "[t]he primary purpose was to protect the well-being of minors by encouraging minors to discuss with their parents the decision whether to terminate their pregnancies." Finding 58, Hodgson Appendix 24a-25a. The court also found that a desire to dissuade minors from choosing to terminate their pregnancies also motivated the legislature. Finding 59, Hodgson Appendix 25a. This finding was based on no more than the testimony before a legislative committee of some supporters of the act who hoped it "would save lives." There is no direct evidence, however, that this was the motive of any legislator.

II. Procedural History.

The parental notification statute was to become effective August 1, 1981. On July 30, 1981 a number of minors desiring to represent a class of minors seeking abortions who claimed to be mature, a parent of such a minor, and four clinics and two physicians who perform abortions commenced an action in the district court seeking a declaratory judgment and an injunction. Named as defendants were the State of Minnesota, its Governor, and its Attorney General.[3]

Plaintiffs raised four claims against Minn. Stat. § 144.343, subds. 2-7. First, plaintiffs alleged that the statute violates due process, both on its face and as applied. Second, plaintiffs challenged the statute on equal protection grounds. Third, plaintiffs asserted that the statute, as applied to estranged families, violates due process and first amendment rights of custodial parents by effectively compelling communications between the custodial parent and the absent, noncustodial parent. Finally, plaintiffs claimed that the statute violates the due process, privacy and equal protection provisions of Article I of the Minnesota Constitution and that the judicial bypass procedure constitutes a delegation of administrative power to Minnesota courts in violation of Article III of the Minnesota Constitution. Amended Complaint, ¶¶ 50-54, J.A. at 47-50.

On July 31, 1981, the district court temporarily restrained enforcement of subdivision 2 of the statute but denied plaintiffs' motion for an order temporarily restraining enforcement of subdivision 6. Thereafter on March 2, 1982, the district court preliminarily enjoined subdivision 2. By virtue

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[3] The parties will be referred to with reference to their posture at trial. Cross-petitioners will be referred to as "defendants" and the respondents as "plaintiffs."

of these two rulings, the judicial bypass procedure of subdivision 6 went into effect on August 1, 1981.

On January 23, 1985, the district court granted in part and denied in part defendants' motion for summary judgment as to plaintiffs' claims concerning the judicial bypass procedure of subdivision 6. Specifically, the district court granted summary judgment in defendants' favor concerning the judicial bypass procedure with respect to plaintiffs' state constitutional claims, equal protection claims, and facial due process claim and ordered all such claims dismissed. The district court concluded, however, that plaintiffs should have the opportunity of a trial to prove their allegations that the judicial bypass procedure was being unconstitutionally applied in violation of due process guarantees. Hodgson Appendix 146a-157a.

Plaintiffs' remaining claims were tried to the district court between February 10 and March 13, 1986.

The district court issued its findings of fact, conclusions of law and final order on November 6, 1986. The district court declared Minn. Stat. § 144.343, subds. 2-7, unconstitutional and permanently enjoined defendants from enforcing any of its provisions.

In concluding that the parental notification requirement of subdivision 2 was unconstitutional, standing alone, the district court cited three decisions of this Court dealing with parental consent statutes[4] and summarily concluded that "[a] State choosing to encourage parental involvement in their minor child's decision to have an abortion must provide an alternative procedure through which a minor may demonstrate that

[4] *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976).

she is mature enough to make her own decision or that the abortion is in her best interests" (Hodgson Appendix at 37a), and that "[a] statute that fails to provide such an alternative to a consent or notification requirement imposes an undue burden upon the exercise by minors of the right to seek an abortion." *Id.* at 38a.

With respect to the alternative judicial bypass procedure, the district court concluded that Minnesota's statute complies both on its face and in actual practice with the principles set forth by the Court in *Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*), *H. L. v. Matheson*, 450 U.S. 398 (1981), and *Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476 (1983) and that plaintiffs' challenge to the statute as a whole must accordingly be rejected. Hodgson Appendix at 45a. The court nevertheless then proceeded to enjoin the statute as a whole upon determining that two features of the notice element of the notice/bypass system (the 48-hour waiting period and the two-parent notice requirement) were unduly burdensome and hence unconstitutional. *Id.* at 45a-49a. The court concluded that the 48-hour waiting period could be severed from the remainder of the statute but that the two-parent notification requirement could not. Based upon this determination of non-severability, the district court then concluded that it must enjoin the statute in its entirety. *Id.* at 50a-51a.

On August 27, 1987, a panel of the Eighth Circuit affirmed the district court's decision. On November 13, 1987, the panel granted defendants' request for rehearing by the panel, vacated and withdrew its prior opinion, held any further decision in abeyance pending a decision by this Court in *Hartigan v. Zbaraz*, 484 U.S. 171 (1987), and denied rehearing *en banc* as moot.

After an equally divided Supreme Court affirmed the decision of the Seventh Circuit without opinion in the *Zbaraz* case, the Eighth Circuit granted defendants' request for *en banc* review. The *en banc* opinion was issued August 8, 1988.

In its *en banc* opinion, the court of appeals held that the prior decisions of this Court required a determination that a judicial bypass procedure is constitutionally required as an alternative to a parental notification law and affirmed the district court to the extent that the district court had declared unconstitutional and enjoined enforcement of the Minnesota parental notification requirements standing alone. The court of appeals, however, reversed the district court in part by holding that Minnesota's parental notification law with the judicial bypass procedure in place is constitutional.

On January 5, 1989, plaintiffs filed a petition for certiorari seeking review of the circuit court decision insofar as it upholds the notice/bypass version of the statute. Case No. 88-1125. Pursuant to Rule 19.5, the defendants thereafter filed a cross-petition for certiorari seeking review of the circuit court decision declaring unconstitutional the notice requirement without a court bypass. Case No. 88-1309. This brief addresses only the issues pertinent to the cross-petition.

III. Facts.

A. The Parental Notification Requirement Generally.

The statutory requirement of parental notification contained in Minn. Stat. § 144.343, subd. 2, was intended to serve the state's substantial and legitimate interest in the family-based child-rearing process and in protecting the well-being of minors in connection with the consequences of a decision to have an abortion by enabling parents to offer support and

guidance in helping their daughter to make an informed decision regarding her unintended pregnancy without imposing a parental veto on that decision. D. Exh. 70-72, J.A. at 502-07.

Plaintiffs at trial brought on numerous lay and expert witnesses in support of their challenge to the parental notification requirement. The testimony critical of the parental notification requirement falls into two broad categories: (1) testimony concerning various burdens allegedly imposed upon pregnant minors by the parental notification requirement, and (2) testimony questioning both the necessity and the effectiveness of the parental notification requirement in actually furthering the statutory purpose of promoting the well-being of minors confronted with an unintended pregnancy and the decision of whether or not to terminate that pregnancy.

B. The Alleged "Burden" of Parental Notification.

Much of plaintiffs' evidence concerning the alleged burdens of the parental notification requirement relates to the incidence and prevalence of "dysfunctional" families and intra-familial violence in the United States generally. According to one of plaintiffs' experts, a "normal" family is one in which there is functioning communication and a reasonable amount of trust. J.A. at 252. By contrast, a "dysfunctional family," as defined by plaintiffs' experts, does not cope effectively with daily stresses and woes of its members and communication is impaired. J.A. at 250, 251. Members of a dysfunctional family may engage in family violence, and studies indicate that violence occurs in two million families in the United States. J.A. at 188-90, 198, 199. There are some minors in Minnesota who fear violence from family members. J.A. at 116-17, 161, 203-04. In addition, it appears that a very small minority of pregnant minors in Minnesota wish to

avoid telling one or both of their parents about their intended abortion because of fear of physical abuse.[5]

The State's witnesses did not dispute that there exist dysfunctional families in which there is violence or abuse or that there are minors in Minnesota who are victims of violence or who fear violence. Nevertheless, although parents of several thousand minors were notified of their daughters' decision to have an abortion pursuant to the statutory requirement from August 1, 1981, to March 1, 1986,[6] the record fails to reveal a single instance in which any such minor has suffered any violence as a consequence of the notification.

A small minority of Minnesota minors have sought to avoid notifying their parents of the abortion on the basis of an apprehension that their parents would somehow prevent the abortion from occurring.[7] Once again, however, of the several

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[5] Of 258 minors appearing before Ramsey County Judge Peterson in judicial bypass hearings in the period from August 1, 1981, through November 30, 1982, four percent indicated that they did not wish to notify their parents about their abortion because of fear that prior physical abuse would recur. Plaintiffs' Exhibit (P. Exh.) 21, J.A. at 381-82.

[6] During this period 3,573 by-pass petitions were filed in Minnesota courts. D. Exh. 69. J.A. at 493. Both Dr. Hodgson, J.A. at 460, and Paula Wendt, the co-director of Meadowbrook Women's Clinic, J.A. at 123, testified that only about one-half of their minor patients choose the court bypass option. The actual figures offered by Wendt disclose that only 40 percent of Meadowbrook minors have chosen the court option. J.A. at 123. Since very few minors have been excused under the emancipation or abuse/neglect exceptions, it is reasonable to conclude that the number of minors who have notified their parents is at least equal to the number that sought court dispensation. *See also* Opinion of the Circuit Court at Hodgson Appendix 83a n.9.

[7] Of the 258 minors appearing before Juvenile Court Judge Peterson in judicial bypass proceedings for the period August 1, 1981, to November 30, 1982, five percent expressed such a fear. P. Exh. 21, J.A. at 381.

thousand pregnant minors who have notified both parents pursuant to the statutory requirements since August 1, 1981, the record fails to reveal a single instance of parental prevention of an abortion.

Plaintiffs also presented evidence of the claims of various minors made to counselors, health care providers and judges that notification to their parents would result in various other consequences perceived by the minors as unpleasant. The reasons claimed by minors for not wishing to make their parents aware of their pregnancy and abortion decision are numerous and include fear of disapproval and hostility, punishment, interference with her relationship with her boyfriend, upsetting a seriously ill parent and generally damaging the parent-child relationship. *See, e.g.*, J.A. at 114-15, 460. P. Exh. 21, J.A. at 381-82.

It appears, however, that a common, if not the most common, reason for the minor's desire to avoid parental notification is a general fear of damaging her relationship with her parents. P. Exh. 21, J.A. at 381-82. This is so even in good, functional families. As plaintiff Meadowbrook's co-director Paula Wendt testified based upon her substantial experience in counseling abortion patients, minors seeking to avoid parental notification commonly explain that desire on the basis of "not want[ing] to ruin a good relationship." J.A. at 114. Similarly, Dr. Hodgson herself testified that minors commonly seek to avoid parental notification as "a matter of love for their parents and they don't want to spoil the relationship that they have with their parents." J.A. at 460.

Moreover, as testified by a number of witnesses, including Dr. Hodgson, adolescents often misapprehend their parents' likely actions in response to their decision to obtain an abortion. J.A. at 178, 336, 358-60, 473. Dr. Hodgson likewise agreed with defendants' experts that notwithstanding the ap-

prehensions of pregnant minors, parents are generally supportive in helping a minor deal with an unintended pregnancy. J.A. at 355-60, 473, P. Exh. 92 (Hodgson Depo.) at 187.

C. The Need for and Effectiveness of Parental Notification.

In addition to plaintiffs' evidence concerning the alleged burdens involved in the parental notification requirement, a number of plaintiffs' expert witnesses also presented theories challenging the need for and the effectiveness of the statutory notification requirement in promoting the state's goals of protecting the well-being of minors in connection with the consequences of a decision to have an abortion.

With respect to the necessity of parental notification, plaintiffs' psychological expert Gary Melton testified that in his view the maximum level of intellectual ability is reached by age 14 and that by all available measures of competency, minors are indistinguishable from adults in their capacity to make personal decisions. J.A. at 256-61. More particularly, in his opinion, minors are as competent as adults to make reproductive decisions, including whether or not to terminate a pregnancy and there is no empirical basis for distinguishing between competency to choose to abort and competency to choose to carry to term or to obtain prenatal medical care. J.A. at 262, 263, 268. This same psychological expert, however, also testified that "capacity" to give informed consent to a particular medical procedure is unrelated to maturity, quantity of life experience, overall reasoning ability or even mental health. J.A. at 261-62, T. 1180-81.[8] *See also* T. 959. Moreover, certain of plaintiffs' witnesses also indicated that, in their view a minor's desire to have an abortion, particularly

[8] Page references preceded by "T." are to portions of the trial transcript not contained in the Joint Appendix.

without notifying her parents was, in itself, a demonstration of maturity. *See* finding 65, Hodgson Appendix 27a-28a, and testimony of Jane Hodgson, J.A. at 475.

With respect to the effectiveness of a parental notification requirement, a number of plaintiffs' psychological and health care witnesses questioned the proposition that a parental notification requirement would promote family communication or aid minors in their abortion decision-making. For example, plaintiffs' psychological expert, Dr. Melton, observed that laws mandating parental notice "are not necessarily going to result in [a minor's] more reasoned decisionmaking." J.A. at 267. Another of plaintiffs' experts in the field of communication patterns within violent families similarly testified that there is no clinical or research data which suggests that forced parental notification in abusive, dysfunctional families would have a positive effect on family communication. J.A. at 198. *See also* J.A. at 476.

However, as a number of plaintiffs' experts themselves recognize, an unplanned pregnancy is an extremely traumatic event for a minor and subjects her to extreme psychological stress. J.A. at 141, 304, 472. In this regard, plaintiffs' experts appear to agree in substantial measure with the testimony of defendants' expert Dr. Vincent Rue. Based upon his clinical experience in providing therapy to pregnant minors, Dr. Rue testified that such minors are psychologically vulnerable when dealing with an unintended pregnancy. Dr. Rue further testified that such vulnerability can result in irrational and emotional decisionmaking. J.A. at 360.

For those minors who choose abortion, distinct medical and psychological risks are posed. Although abortion is a relatively safe medical procedure, there is at least a remote risk of death. J.A. at 351-52, P. Exh. 54, p. 40. In addition, the risks of abor-

tion include hemorrhage, infection, perforation of the uterus, cervical damage and possible future infertility. J.A. at 352-53. As Dr. Hodgson has herself recognized, adolescents tend to have higher infection rates after abortion than adults because they tend to delay post-abortion care and ignore complications. J.A. at 446. It has also been the experience of the plaintiff abortion clinics that some minors are unable to take responsibility for their post-abortion care without adult supervision, and many do not return to the clinic for after-care. J.A. at 111-12, 148-49, 211. As further noted by defendants' witness, Dr. Richard Schmidt, minors whose parents have not been notified often tend to minimize and delay treatment of complications appearing after an abortion. J.A. at 353-55. Parental notification can thus in many cases serve the important function of assisting in the prompt recognition of post-abortion complications and in providing adult supervision for proper post-abortion care. In addition, parents may in some cases be aware of aspects of a minor's medical history of which the minor herself is not aware. J.A. at 353.

A minor who chooses to resolve an unwanted pregnancy through abortion is also at psychological risk. As plaintiff Meadowbrook's co-director Paula Wendt testified based upon her substantial experience in counseling abortion patients, it is not uncommon for young women to feel depressed after an abortion, and for some this feeling of depression is not a trivial phenomenon. J.A. at 148, P. Exh. 69, J.A. at 424-25. The adverse psychological consequences of abortion may also include guilt, hostility, sadness, remorse, insomnia, eating disorders, relationship difficulties, anniversary reactions and even suicide attempts. J.A. at 361-63. These adverse consequences, although not common in their more severe form, are well documented in the professional literature. J.A. at 362-63,

D. Exh. 68, J.A. at 486-92.[9] Dr. Steven Butzer, one of plaintiffs' psychiatric experts, testified that he has provided psychiatric therapy to a number of adolescent patients for post-abortion mental health problems. J.A. at 304.

Because of the danger of such adverse psychological sequelae, parental involvement and consultation may serve to support the psychological well-being of the pregnant minor, whether or not she chooses to abort. Indeed, the lack of parental involvement in the minor's abortion decision may itself exacerbate the problem by insulating and isolating the minor and creating considerable guilt, depression, remorse, sadness, both immediately and in the future. T. at 2270-74.

Moreover, adolescents often misapprehend their parents' reaction to their decision to obtain an abortion, and parental guidance in dealing with an unintended pregnancy can be helpful to the minor even though she may not initially seek out such guidance. J.A. at 178-79, 305, 355-56, 359, 472-73.

Although abortion providers generally counsel their patients concerning options in resolving an unintended pregnancy, there is no assurance that such counseling will be performed by trained and experienced persons. For example, two "teen advocates" of the Midwest Health Center for Women have performed abortion counseling when only 17 years old and while relatively untrained and inexperienced. J.A. at 213, 222-23, 227-29.

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[9] Dr. David, one of the plaintiffs' several expert witnesses, testified that women age 16 and under are very likely to find abortion more stressful than older women and that even 17-year-old women may also encounter greater stress than older women depending on the individual and her family situation. J.A. at 377. Dr. David also pointed out that adolescents in the United States are more at risk for adverse psychological sequelae than adolescents in some other countries, e.g., Denmark, where abortion is less controversial or likely to engender feelings of guilt. J.A. at 376.

In light of the totality of evidence concerning the need for or the utility of a parental notification requirement, the district court specifically found that:

> Parents can provide emotional support and guidance and thus forestall irrational and emotional decision-making. Parents can also provide information concerning the minor's medical history of which the minor may not be aware. Parents can also supervise post-abortion care. In addition, parents can support the minor's psychological well-being and thus mitigate adverse psychological sequelae that may attend the abortion procedure.

District court finding 58, Hodgson Appendix 24a-25a.

D. The Requirement That Both Parents Be Notified.

Plaintiffs also criticized the parental notification law to the extent that it requires that *both* parents be notified. Plaintiffs' evidence in this regard falls into three categories: (1) evidence concerning the prevalence of divorce in the United States and in Minnesota, J.A. at 125-26, T. at 996-97; (2) opinion testimony that in "dysfunctional" families, involvement of a non-custodial parent can sometimes produce unwanted or disappointing consequences to the custodial parent and the minor, J.A. at 127-29, 131-32, 167-68, 251; and (3) opinion testimony that where a minor has already voluntarily notified a single parent, notification of the second parent serves little purpose. T. at 927. However, plaintiffs' expert Dr. Elissa Benedek testified that in cases not involving abuse, it is important for a child to maintain a relationship with the non-custodial parent. J.A. at 254.

Defendants' expert Dr. Rue also testified as to his clinical experience in providing psychotherapy to minors confronted with problem pregnancies. Dr. Rue has encouraged his pregnant minor patients to involve the non-custodial parent and when such advice has been followed, he has observed a subsequent improvement in the relationship between the child and the non-custodial parent. J.A. at 368-69.

E. The 48-Hour Length of the Parental Notification Requirement.

Minors who elect to have their parents notified by written notice must wait until 48 hours after actual or constructive delivery of written notice. Constructive delivery of mail notice occurs at noon on the regular mail delivery date following mailing. Thus the effective length of the statutory parental notice requirement may in many instances be 72 hours.

It is undisputed that all other things being equal, it is medically preferable to have an abortion at an earlier gestational age than at a later gestational age and that a second trimester abortion is statistically somewhat more risky and is in fact more expensive than a first trimester procedure. There is no evidence in the record, however, that a delay of 48 or 72 hours is medically significant. Plaintiff Meadowbrook's co-director Paula Wendt and Dr. Horowitz, an experienced abortion practitioner and co-owner of Meadowbrook, each testified that there is no significant increased risk of medical complication from week to week within the first trimester and that delays of up to one and one-half weeks within the first trimester do not generally increase the risk of medical complication. J.A. at 146-48, 370-73. Presumably based upon such testimony, the district court specifically found that although delay of any length in performing an abortion increases the statistical risk of mortality and morbidity, "[t]he increase in risk becomes statistically significant when the length of delay reaches one week." District court finding 53, Hodgson Appendix 23a.

With respect to the actual operation of the 48-hour waiting period, the district court found that:

> This statutorily imposed delay frequently is compounded by scheduling factors such as clinic hours, transportation requirements, weather, a minor's school and work commitments, and sometimes a single parent's family and work commitments. In many cases, the effective length of delay may reach a week or more.

District court finding 52, Hodgson Appendix 22a-23a. The court's finding regarding possible delays of a week or more appears to be based upon facts relating to the relative inaccessibility of abortion services in Minnesota. District court findings 22-26, Hodgson Appendix 14a-15a. It is not otherwise apparent from the record, however, how these logistical difficulties would cause the 48-hour notice requirement to result in delays of a week or more. Typically, when a pregnant minor telephones an abortion clinic to arrange an abortion, the operation, in the absence of unusual medical circumstances, is not scheduled to occur sooner than 48 or 72 hours hence. J.A. at 146-48, 370-71. Opinion of the Circuit Court, Hodgson Appendix 97a. Accordingly, in such typical cases it does not appear from the record how the fulfillment of the 48-hour parental notice requirement delays the abortion operation at all.[10]

In any event, the record fails to establish a single instance in which any delay associated with the length of the parental notification requirement has resulted in medical complication.

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[10] For example, the telephone training manual of Meadowbrook Clinic indicates that if a pregnant minor calls on a Monday and reveals that she wishes to comply with the statute by mailed parent notification, the notification is mailed on that same day and the abortion may be scheduled as soon as Thursday. *See* P. Exh. 70A, at p. 4, J.A. at 433.

Public health data collected, maintained and published by the Minnesota Department of Health likewise fail to reveal any significant increase in medical complications among the population of minors undergoing abortions since August 1, 1981. J.A. at 347-48. Moreover, those data record no increase in the average gestational age of minors obtaining abortions in Minnesota or significant change in the proportions of minors receiving second trimester abortions in Minnesota since August 1, 1981. J.A. at 346-49, P. Exh. 122, J.A. at 477, D. Exh. 35, J.A. at 481.

The district court further acknowledged that "[s]ome period of mandatory delay between the time of actual or constructive notification of the minor's parent and the abortion itself would reasonably effectuate the State's interest in protecting pregnant minors" and that "[a] waiting period may allow parents to aid, counsel, advise, and assist minors in determining whether to undergo an abortion or to provide the physician with information which may be relevant to the medical judgments involved." District court finding 73, Hodgson Appendix 32a. The district court also found, however, that:

> The interest effectuated by the State's 48-hour waiting period could be effectuated as completely by a shorter waiting period. Therefore, to the extent the waiting period exceeds that necessary to allow parents to consult with minors contemplating abortion, it fails to further the State's interest in protecting pregnant minors.

District court finding 74, Hodgson Appendix 32a. The district court does not otherwise explain the basis of this finding, and defendants are unaware of any evidence in the record to support it.

SUMMARY OF ARGUMENT

The Eighth Circuit Court of Appeals declared that Minnesota's parental notice requirement could not stand absent availability of a court-bypass alternative. However, no prior holding of this Court and certainly nothing in the Constitution requires that parents be kept ignorant of such a critical juncture of their child's life as pregnancy and abortion.

The right to choose whether to have an abortion first recognized in *Roe v. Wade*, 410 U.S. 113 (1973), is not absolute but must be weighed against other important public interests. In this case the other interests are fundamental ones of far longer standing than is *Roe v. Wade, i.e.*, that the presumptive right and duty to raise children and be involved in their lives and decisions rightfully belongs to parents rather than "experts" or government agents.

The Court has in the past balanced these rights and interests by declaring that the interest in parental child rearing is not sufficiently strong to permit parents an absolute veto over their daughter's abortion decision. However, the Minnesota notice statute affords no one a veto. It merely requires that parents be informed. Clearly the great interest in parental child rearing is sufficient to overcome the markedly lesser burden of timely notice. To hold otherwise is to permit, in the name of the right to abortion, an absolute veto over the rights and interests of parents and society in parental child rearing.

The record in this case presents nothing to justify the reversal of the longstanding presumption in favor of parental involvement. Nor does it identify a single individual minor who was physically abused, suffered medical complications or was prevented from having an abortion as a result of application of Minnesota's notice/bypass law. Thus, it is submitted that the Court should strike a balance among the various rights

and interests by permitting parents the most basic, and least intrusive tool of the parenting function, knowledge.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN HOLDING THAT MINNESOTA MAY NOT REQUIRE PRE-ABORTION NOTICE TO THE PARENTS OF MINORS WITHOUT PROVIDING AN ALTERNATIVE COURT BYPASS PROCEDURE.

The issue raised by the defendants in this case is one of great importance: whether parents, in whom has always resided the duty of care and nurture, including "the inculcation of moral standards, religious beliefs, and elements of good citizenship,"[11] may be accorded any role whatever in, or even knowledge of, one of the most difficult and potentially far reaching series of events in the life of their young daughter—the discovery of unintended pregnancy, the decision whether to have an abortion, the implementation of that decision and requisite aftercare. Nothing in the Constitution suggests, let alone compels, abandonment, in the singular case of abortion, of the "cardinal [principle] that custody, care and nurture of the child reside first in the parents. . . ." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

A. No Prior Holding Of This Court Precludes A Requirement That A Physician Provide Reasonable Pre-Abortion Notice To The Parents Of An Unemancipated Minor.

The court of appeals gave cursory treatment to the Minnesota statute insofar as it required parental notice without

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[11] *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972).

also providing for an *ex parte* summary court bypass alternative upon the observation that the opinions of a number of present and former Justices of this Court contained *dicta* to the effect that a notice requirement without a court-bypass alternative for "mature" minors would be invalid.[12] Plainly, however, this Court has not directly decided this issue. *See, e.g., Bellotti v. Baird*, 443 U.S. 622, 651-52 (Rehnquist, J., concurring) 654 n.1 (Stevens, J., concurring), 656-57 (White, J., dissenting); *H. L. v. Matheson*, 450 U.S. 398 (1981); *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 469 n.12 (1983) (O'Connor, J., dissenting). Therefore, the Court may uphold the Minnesota parental notice statute without the necessity of either overruling or even retreating from any of its holdings in prior abortion cases.

B. The Minnesota Notice Law Constitutes A Legitimate Balance Among The Several Rights and Interests Of Society, Parents And Minors.

1. The Right to Obtain an Abortion May Be Tempered by Legitimate State Interests, Particularly Those of Constitutional Dimension.

In *Roe v. Wade*, 410 U.S. 113 (1973), this Court determined that there exists a constitutional privacy right of a woman, up to a certain point in pregnancy, to determine whether or not to terminate that pregnancy. That right has never been considered absolute or unqualified, but "must be considered against important state interests." *Id.* at 154. *See also Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 60-61 (1976). Therefore, statutory provisions affecting abortion

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[12] *See* Opinion of the Eighth Circuit Court of Appeals at Hodgson Appendix 81a.

have been permitted where they bear a proper relationship to an appropriate state interest and do not prohibit or "unduly burden" the abortion decision. *See, e.g., Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (may require written informed consent of women); *H. L. v. Matheson*, 450 U.S. 398 (1981) (may require notice to parents of minors in certain cases). Furthermore, it is clear that a state has no obligation to favor or encourage abortion, but may adopt policies which encourage childbirth over abortion. *Webster v. Reproductive Health Services*, —— U.S. ——, 109 S.Ct. 3040, 57 U.S.L.W. (July 3, 1989); *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977).

The exact strength and description of this abortion "right" have over time been somewhat indistinct and controversial. As applied to adult women, in some circumstances it is said to be a "fundamental" right, immune to all state restrictions save those "narrowly tailored" to serve a "compelling state interest." *See, e.g., Roe v. Wade*, 410 U.S. 113, 155 (1973). In other circumstances, however, the Court has indicated that regulation may be permitted if it is not unduly burdensome and serves an "important" interest of the state. *See, e.g., Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 430-31 (1983).

In its most recent decision, a majority of the members of the Court appear to conclude that, however the right or liberty interest recognized by *Roe* is described, a state regulation pertinent thereto may survive constitutional challenge if it is reasonably designed to further a "legitimate" state interest and does not unduly burden the abortion process. *Webster v. Reproductive Health Services*, 57 U.S.L.W. at 5031 (plurality opinion of Rehnquist, C.J., White, J., and Kennedy, J.); *id.* at 5033 (O'Connor, J., concurring); *id.* at 5034 (Scalia, J., concurring).

These various formulations may be reconciled by a recognition that the appropriate analysis involves a balancing between the degree of direct "burden" upon the abortion decision and the strength of the state interest sought to be effectuated by the regulation. Thus, a compelling state interest in protecting fetal life is sufficient to justify an outright prohibition of abortion, at least after "viability." *Roe*, 410 U.S. at 163-64. On the other hand a mere state preference for childbirth over abortion is sufficient to support a regulation which creates no direct obstacle to abortion, even if some women may consequently find abortions more difficult to obtain. *See Maher v. Roe*; *Harris v. McRae*; *Webster v. Reproductive Health Services.* Where the statute imposes some burden short of virtual prohibition or severe limitation it should be upheld if it rationally furthers legitimate public purposes. *See, e.g., Webster*; *Akron*, 462 U.S. at 453 (O'Connor, J., dissenting). The statutory requirement of providing notice to parents satisfies this standard.

2. The State's Interest in Parental Involvement in Their Children's Welfare Is Well-Established and Constitutionally Based.

The Court has long acknowledged the legitimacy of the states' interest in preserving and facilitating parental involvement in the affairs of minors. The strong public and parental interests recognized by the Court are not of recent origin, nor are they derived from fluctuating sociological theories. Rather they are virtually as old as civilization. The existence and necessity for the parental role have, indeed, been strongly asserted by this Court since this nation was founded. As stated in *Stanley v. Illinois*, 405 U.S. 645, 651 (1972):

The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), "basic civil rights of man," *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and "[r]ights far more precious . . . than property rights," *May v. Anderson*, 345 U.S. 528, 533 (1953). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer v. Nebraska, supra*, at 399, the Equal Protection Clause of the Fourteenth Amendment, *Skinner v. Oklahoma, supra*, at 541, and the Ninth Amendment, *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring).

This revered and protected function of parents extends into virtually every area of the child's life. So important is this role of parents and family that any interference therewith by the state or third persons is tolerated only in situations of necessity.

This rule extends as well to the area of medical procedures. Thus, under the common law "generally speaking, the rule has been considered to be that a surgeon has no legal right to operate upon a child without the consent of his parents or guardian." *Bonner v. Moran*, 126 F.2d 121, 122 (D.C. Cir. 1941). As otherwise stated in *Moss v. Rishworth*, 222 S.W. 225, 226 (Tex. Comm'n App. 1920):

> It is insisted that the paramount interest of the child alone must be considered in determining whether such

> an operation shall be performed, and that if her health demanded an operation, and that, if skillfully performed, no cause of action would arise, even though it resulted disastrously. The law wisely reposes in the parent the care and custody of the minor child, and neither a physician nor those in temporary custody of the child will be permitted, in a case of this character, to determine those matters touching its welfare.

Plainly, these rights are not based upon simple legislative or judicial expressions of policy but are firmly grounded in the Constitution itself. *See, e.g., Roe v. Wade,* 410 U.S. 113, 152-53 (1973); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925). Thus, natural parental rights may be terminated only where unfitness of the parent is established in accordance with full due process safeguards. *See Stanley v. Illinois,* 405 U.S. 645 (1972).

The right of the parent to shape the child's values and life style has been generally found beyond the control of the state or of well-meaning officials or third persons proposing to have a child's "best interests" at heart. *See, e.g., Wisconsin v. Yoder,* 406 U.S. 205 (1972). Thus, it is only where a compelling need to safeguard the safety or welfare of a child has been identified or an important need of society is demonstrated that parents are denied the right to determine and strive for what they believe to be best for their children based upon their natural affection and concern and familiarity due to intimate continuous contact with the unique aspects of their lives and course of development.

Based upon generations of experience, the law plainly recognizes parents as the persons most likely to act out of a genuine concern for the child's interests and to be possessed of

the knowledge of the child necessary to wisely make such judgments. As was recognized by the Court in *Parham v. J.R.,* 442 U.S. 584 (1979):

> As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attests to this. That some parents "may at times be acting against the interests of their children" . . . creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests.

Id. at 602-03 (citations omitted).

3. A Parental Notice Requirement Strikes a Permissible Balance Between the Interest in Parental Involvement and the Right to Abortion.

Specifically in situations involving abortions upon children the Court has acknowledged these firmly established interests of society and parents. The Court has recognized these interests as sufficiently compelling to justify requiring, as a general proposition, parental involvement in a minor's abortion decision at least so long as that involvement does not grant parents an "absolute and possibly arbitrary veto." As explained in *Bellotti v. Baird,* 443 U.S. 622 (1979) (*Bellotti II*):

> [P]arental notice and consent are qualifications that typically may be imposed by the State on a minor's right to make important decisions. As immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, a State reasonably may determine that parental consultation often is desirable and in the best interest of the minor. It may further determine, as a general proposition,

that such consultation is particularly desirable with respect to the abortion decision—one that for some people raises profound moral and religious concerns. As MR. JUSTICE STEWART wrote in concurrence in *Planned Parenthood of Central Missouri v. Danforth,* [428 U.S.,] at 91:

> "There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place."

Id. at 640-41 (footnotes omitted). *See also H. L. v. Matheson,* 450 U.S. 398 at 409-10 (1981). Thus, the Court has acknowledged that a state has a legitimate interest in seeking to assure that parental consent is obtained before the performance of an abortion upon a minor. *See Bellotti II,* 443 U.S. at 640-41 (plurality opinion) and *Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft,* 462 U.S. 476, 490 n.15 (1983).

Nevertheless, in striking a balance between the state's interest in preserving the legitimate constitutional objective of parental involvement in their children's affairs and the right recognized in *Roe v. Wade,* the Court has limited the state's ability to pursue the former goal. A number of Justices have indicated that, unlike numerous other activities of minors which are either forbidden or permitted only with

express parental approval, an abortion decision is one which cannot be postponed until adulthood. Therefore, a majority of the Court has previously concluded that parents may not be granted an "absolute and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy." *See Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 74 (1976). Accordingly, the Court ruled that a state may not mandate parental consent unless some alternate procedure is available whereby such an arbitrary veto may be avoided. *Bellotti II,* 443 U.S. at 643-44.

The courts below extended that rule to Minnesota's attempt to mandate parental notice without a requirement of consent. Neither the holdings of this Court nor the legal reasoning contained in its opinions justifies that extension.

Admittedly, in *Bellotti II* some Justices would have apparently gone further to conclude that even a general requirement of notice to parents would in some situations be improper. Justice Powell, joined by Justices Burger and Stewart, identified as a deficiency in the Massachusetts statute at issue the requirement that parents would always receive notice of the judicial proceedings wherein the daughter sought to avoid the consent requirement. The objection, like that of the trial court here, to this parental notice requirement apparently was based upon the observation that there are parents who would obstruct and perhaps altogether prevent the minors' right to have an abortion or go to court. *See, e.g., Bellotti II,* 443 U.S. at 647 (opinion of Powell, J.); *H. L. v. Matheson,* 450 U.S. 398, 420 (Powell, J., concurring); 438-39 (Marshall, J., dissenting).[13]

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[13] These Justices have also derived from the *Danforth* and *Bellotti II* veto formulation, the notion that a "mature" minor must also be permitted to avoid any parental notification in her absolute discretion. *See Matheson,* 450 U.S. at 414 (Powell, J., concurring). It

While a majority of the *Bellotti II* Court concurred in the judgment striking down the Massachusetts statute, it is clear that a majority of the Court did not necessarily endorse, in principle, Justice Powell's objection to parents receiving notice of the bypass proceeding. *See* 443 U.S. at 651-52 (Rehnquist, J., concurring), 654 n.1, 656 n.4 (Stevens, J., concurring). Plainly Justice Powell's observations in the context of a parental consent case did not signal a sweeping determination by a majority of the Court that statutes requiring *notice* to parents prior to minors' abortions are *per se* invalid. Justice Stevens in his concurring opinion in *Bellotti II* pointed out that:

> By affording such a veto, the Massachusetts statute does far more than simply provide for notice to the parents. *See post,* at 657 (WHITE, J., dissenting). ***Neither Danforth nor this case determines the constitutionality of a statute which does no more than require notice to the parents, without affording them or any other third party an absolute veto.***

443 U.S. at 654 n.1 (emphasis added). *See also H. L. v. Matheson,* 450 U.S. 398 (1981) (Utah statute which required parental notice but not parental consent to abortions not unconstitutional on its face despite lack of a formal notice-avoidance procedure).

Some Justices have adhered to the view that minors must be permitted to avoid any parental involvement whatever if they

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is not clear, however, whether, or in what way, the case of the "mature" minor relates to the spectre of the absolute veto which forms the basis of the *Danforth* and *Bellotti II* holdings. As pointed out by Justice Stevens, concurring in *Matheson,* "Almost by definition, however, a woman intellectually and emotionally capable of making important decisions without parental assistance also should be capable of ignoring any parental disapproval." 450 U.S. at 425 n.2.

deem themselves "mature" or determine that it is in their "best interests" to do so. *See, e.g., Matheson, supra,* 450 U.S. at 413-14 (Powell, J., concurring), 453 (Marshall, J., dissenting). The reasoning supporting that position, apparently based on the fear of obstructive parents articulated by Justice Powell in *Bellotti II* and the notion that a regulation that hypothetically could pose any impediment to obtaining an abortion is faulty, does not however give due recognition to the fact that *Roe v. Wade* did not purport to establish a "right to abortion" as an end in itself. *See Roe,* 410 U.S. at 208 (Burger, C.J., concurring); *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747, 783 (1986) (Burger, C.J., dissenting). Far more persuasive is the point made by Justice White dissenting in *Danforth, supra.*

> [T]he very right created in *Roe v. Wade, supra,* [is] the right of the pregnant woman to decide "whether *or not* to terminate her pregnancy." 410 U.S. at 153 (emphasis added). The abortion decision is unquestionably important and has irrevocable consequences whichever way it is made. Missouri is entitled to protect the minor unmarried woman from making the decision in a way which is not in her own best interests, and it seeks to achieve this goal by requiring parental consultation and consent. This is the traditional way by which States have sought to protect children from their own immature and improvident decisions, and there is absolutely no reason expressed by the majority why the State may not utilize that method here.

428 U.S. at 94-95 (footnote omitted). The validity of this rationale was further underscored by the dissent of Justice Stevens:

Therefore, the holding in *Roe v. Wade* that the abortion decision is entitled to constitutional protection merely emphasizes the importance of the decision; it does not lead to the conclusion that the state legislature has no power to enact legislation for the purpose of protecting a young pregnant woman from the consequences of an incorrect decision.

The abortion decision is, of course, more important than the decision to attend or to avoid an adult motion picture, or the decision to work long hours in a factory. It is not necessarily any more important than the decision to run away from home or the decision to marry. But even if it is the most important kind of a decision a young person may ever make, that assumption merely enhances the quality of the State's interest in maximizing the probability that the decision be made correctly and with full understanding of the consequences of either alternative.

> The Court recognizes that the State may insist that the decision not be made without the benefit of medical advice. But since the most significant consequences of the decision are not medical in character, it would seem to me that the State may, with equal legitimacy, insist that the decision be made only after other appropriate counsel has been had as well. Whatever choice a pregnant young woman makes—to marry, to abort, to bear her child out of wedlock—the consequences of her decision may have a profound impact on her entire future life. A legislative determination that such a choice will be made more wisely in most cases if the advice and moral support of a parent play a part in the decision making process is surely not irrational.

Id. at 102-03.

While the force of these arguments did not command a majority of the Court in *Danforth*, where the requirement of parental *consent* was held to impose the direct burden of an absolute and potentially arbitrary *veto* upon the abortion, their power is substantially more apparent in support of the proposition that parents must be permitted at the very least to know of their daughter's plight.

In distinguishing between this case and *Danforth*, the Court might assume, *arguendo*, that it is prudent to strike a balance between the "rights" of minors ultimately to obtain abortions and the strong interests of the state and parents in the care, nurture and raising of minors, by not providing all parents with a veto of the minor's decision in all circumstances. The Minnesota notice statute, however, gives no one a veto power, either explicitly or implicitly. In fact, Minnesota's statute expressly provides that a minor can, after having given the requisite notice, obtain an abortion without the consent of any other person. All that is required is that those persons to whom our society, legal system and constitution have committed the care, nurture and upbringing of children have a reasonable opportunity to *know* of a critical, stressful and potentially hazardous situation facing their child.

One can conceive of no more narrowly tailored provision for the effective furtherance of the important protective interests of the state and rights of parents than the general providing of notice to parents of unemancipated minors who have not been victims of abuse or neglect. To accord such notice strikes a balance between the rights of minors to abortion and the tremendously strong interests of the state and parents in safeguarding the welfare of children without permitting either set of rights and interests a lawful veto over the other.

To forbid the requiring of notice, however, tips the balance wholly against the interests of the state and parents and

grants to the minor, or the minor and a judge, an "absolute and possibly arbitrary veto" over these legitimate and time honored rights and interests of parents and society.

To hold the Minnesota statute invalid would reverse the longstanding, rebuttable presumption that parents can, should and will act in the best interests of their minor children. In its stead would be erected a virtually irrebuttable presumption that parents, those persons in the best position to bring forth pertinent information, are to be excluded from the decision-making process. Plainly there has been presented in this case neither persuasive argument nor evidence sufficient to compel this extreme reversal of a philosophy inherent in our culture since before the nation was founded.

C. The Minnesota Notice Statute Furthers The Important Interest In Parental Involvement.

As set forth in detail above at pp. 13-15, unwanted pregnancy and abortion are both potentially psychologically and physically traumatic events. This is particularly true for minors who are not, in general, as capable as adults of contending alone with the emotional and psychological stresses involved or recognizing the need for and carrying through proper after-care procedures. Parental involvement with their child at and after this difficult and stressful time can clearly serve numerous useful functions. It can remove the added emotional and logistical stress and isolation brought on by the perceived need to hide the facts from parents. It can permit parents before, during and after the abortion decision to provide emotional, moral and physical support and guidance in connection with whatever course of action is pursued. It can permit parents to make known information potentially relevant to the medical decision on abortion and subsequent medical procedures. It can

also enable parents to assist with ensuring that proper after-care procedures are followed. Indeed, lack of parental knowledge of an abortion can be a factor in minors' delaying treatment of post-abortion complications which do arise. J.A. at 353-55.

Plaintiffs' witnesses further recognize that parents are generally supportive in helping a minor deal with an unintended pregnancy. J.A. at 355-59, P. Exh. 92 (Hodgson Depo.) at p. 187. Moreover, adolescents often misapprehend their parents' reaction to their decision to obtain an abortion, and parental guidance in dealing with an unintended pregnancy can be helpful to the minor even though she may not initially seek out such guidance. J.A. at 178-79, 305, 359-60, 472-73. The fact of teenage pregnancy itself generally bespeaks a need for further parental involvement in the life of the daughter subsequent to the abortion, if it is to occur.

Furthermore, it should not be overlooked that, contrary to the views of some of plaintiffs' witnesses,[14] abortion may not in fact be the best choice for every child. The decision is one fraught with psychological, ethical and moral concerns which neither abortion providers nor judges are well suited to address. *See Bellotti II*, 443 U.S. at 640, 642-43.

The record does not establish that either abortion providers or judges are satisfactory substitutes for parental input, care and involvement. Although abortion providers generally counsel their patients concerning options in resolving an unintended pregnancy, there is no assurance that such counseling will be performed by trained and experienced persons. For example, two teen advocates of the Midwest Health Center for

[14] See P. Exh. 92, J.A. at 473-75. In the opinion of Dr. Hodgson the desire for abortion is the normal, healthy reaction for the average teenager, and any minor who does not seek any abortion is not "looking ahead" and is apt to be in need of psychiatric help.

Women have performed abortion counseling when only 17 years old and while relatively untrained and inexperienced. J.A. at 213, 222, 227-29. One of these, a named plaintiff in the case, professed to be proud of her ability to get pregnant at age 15. She was sexually active from age 13 and did not regularly use birth control, intending to have an abortion if she became pregnant. J.A. at 222, 227-29.

As was found by the trial court, abortion providers rarely withhold abortions from minors they deem "immature." *See* Hodgson Appendix 41a-42a. Even minors who may be considered sufficiently "mature" to make the abortion decision, can benefit from parental notice and potential involvement since they may not be in a position to deal, all alone, with the abortion process itself, its important aftercare requisites or with the issues of teenage sexuality which have led to the pregnancy in the first instance. These are matters in which neither the abortion provider nor the court can ever provide an adequate and ongoing substitute.[15]

While it may be true that notice may not in retrospect prove helpful in every situation, that fact alone does not undercut the legitimacy of the state's overall purposes. As pointed out by Justice Stevens, concurring in *Matheson*:

> Utah's interest in its parental-notice statute is not diminished by the fact that there can be no guarantee that meaningful parent-child consultation will actually occur. Good-faith compliance with the statute's requirements would tend to facilitate communication between daughters and parents regarding the abortion decision. The possibility that some parents will not react with compassion

[15] It appears, for example, that the approach of at least some abortion providers to the myriad personal, psychological and moral issues inherent in teenage sexual activity centers around the fact that they "aren't very good contraceptors, yet." J.A. at 122.

> and understanding upon being informed of their daughter's predicament or that, even if they are receptive, they will incorrectly advise her, does not undercut the legitimacy of the State's attempt to establish a procedure that will enhance the probability that a pregnant young woman exercise as wisely as possible her right to make the abortion decision.
>
> The fact that certain members of the class of unmarried "minor women who are suffering unwanted pregnancies and desire to terminate the pregnancies" may actually be emancipated or sufficiently mature to make a well-reasoned abortion decision does not, in my view, undercut the validity of the Utah statute. As I stated in *Danforth*, a state legislature has constitutional power to utilize, for purposes of implementing a parental-notice requirement, a yardstick based upon the chronological age of unmarried pregnant women. That this yardstick will be imprecise or even unjust in particular cases does not render its use by a state legislature impermissible under the Federal Constitution.

450 U.S. at 424-25. *See also Webster v. Reproductive Health Services*, 57 U.S.L.W. at 5031 (requirement of viability tests after 20 weeks of pregnancy upheld even though, in many cases, the fetuses will prove to be not viable).

D. The Minnesota Notice Law Does Not Unduly Burden The Abortion Decision Of Minors.

1. Mere Notice Is Not The Equivalent of Consent.

The result of the Minnesota law is in fact to *remove* from minors' abortions the burden of common law incapacity which

could otherwise render the unemancipated minor incapable of valid consent. Thus, in the case of abortion and a small number of other medical processes, the minor is expressly permitted to obtain an abortion upon her consent alone. Her parents merely have to be informed.

Plainly the Minnesota notice law is not the equivalent of parental consent laws which have, in the past, been upheld only to the extent that a judicial bypass procedure is also available. The Minnesota law provides no one an "absolute and possibly arbitrary veto" over the abortion decision of a minor. It merely requires that parents be informed.

Furthermore, it is simply not true as indicated by plaintiffs[16] that parents are required to acknowledge that they were notified. This claim is apparently based upon policies of some clinics rather than any actual requirements of the statute. Pursuant to the statute, notice may be effected either by personal delivery or by certified mail directed to the parent's usual place of abode. Minn. Stat. § 144.343, subd. 2 (1988). In neither event is the signature of the parent required by the statute. In the case of mailed notice the statute plainly provides that "the time of delivery shall be deemed to occur at 12 o'clock noon on the next day on which regular mail delivery takes place subsequent to mailing." *Id.* The statute requires that mailed notice be sent certified mail with restricted delivery and return receipt requested in order to preserve confidentiality and prevent misdelivery. However, there is no requirement that any actual acknowledgement of receipt be received by the clinic.

[16] Petition for Certiorari in Hodgson, Case No. 88-1125 at 18.

2. The Direct Burdens Imposed By The Statute Are Not Substantial.

The only direct burdens imposed by the notice statute on its face are the cost of mailing and a wait for a short time to permit the parents to receive and react, if they so choose, to the notice. Even these requirements are not applicable, however, where the minor declares that she has been abused, or is emancipated; when prompt action is required to save her life, or when the abortion has been authorized in writing by the persons otherwise entitled to notice. Minn. Stat. § 144.343, subd. 4.

The financial "burden" is plainly *de minimis*. The waiting period, as well, is not unduly burdensome in light of the purposes to be accomplished. The district court itself recognized that "[t]he State further may impose some reasonable waiting period subsequent to delivery of notification during which consultation may occur." Hodgson Appendix at 49a.[17] The trial court determined that 48 hours is unreasonable "under conditions presently existing in Minnesota." What particular conditions are referred to or why they render the notice period unreasonable are not clear, however.

There was no showing that any minor suffered any medical complication as a result of the waiting period. As indicated by the trial court's finding number 43, a delay of less than

[17] *See also H. L. v. Matheson*, 450 U.S. 398 (1981):

> Ideally, facilitation of supportive conversation would assist the pregnant minor during an undoubtedly difficult experience. Again, however, when measured against the rationality of the means employed, the Utah statute simply fails to advance this asserted goal. The statute imposes no requirement that the notice be sufficiently timely to permit any discussion between the pregnant minor and the parents.

Id. at 446 (Marshall, J., dissenting).

a week in performing an abortion does not generally increase medical risk to any significant degree. Hodgson Appendix at 20a. Moreover, Minnesota public health data disclose no statistically significant increase in medical complications among pregnant minors during the time the notice/bypass version of this statute was in effect. Plaintiffs, in fact, conceded at trial that no medical complications had resulted from delays allegedly caused by implementing the law. J.A. at 347.

It appears that the trial court's finding was based in part upon the determination that "logistical obstacles" associated with travel make the period too long and that somehow the statute requires a minor from outside a city where abortion clinics exist to make the trip twice or spend additional time in a strange city.

However, the intervention of such a short period or the potential for more than one trip in connection with an abortion have not been found to be unduly burdensome in other cases where the Court has upheld parental consent/judicial bypass statutes. Furthermore, the statute in issue does not itself require that the minor take multiple trips. No reason is apparent why the notice may not be delivered or sent in advance of the minor's abortion appointment. *See, e.g.*, Circuit Court Opinion. Hodgson Appendix at 97a; P. Exh. 70A, p. 4, J.A. at 433.

If indeed the statute is to further its goals of promoting worthwhile parental involvement, 48 hours is certainly not too long to permit parents to assimilate and react to the revelation that they have a pregnant daughter in need of their care. This is particularly true where those parents live in outlying communities if the notice is given after the daughter has left for an abortion in a distant city.

Therefore, the circuit court correctly determined that the 48-hour waiting period was not a significant burden in light of Minnesota's interest in ensuring that notification can potentially result in parental involvement.

3. The Indirect "Burdens" Of Notice Are Not Sufficient To Overcome The Legitimate Purposes Of The Statute.

The trial court based its conclusion that notice could not be required without a court bypass option upon the observation of Justice Powell in *Bellotti II* that "there are parents who would obstruct, and perhaps altogether prevent, the minor's efforts to exercise the right [to submit to abortion]." Hodgson Appendix at 38a. In addition, some plaintiffs assert that some minors fear various other unpleasant consequences from giving notice. These range from fears of physical or sexual abuse, to concerns over parental disappointment. While these general assertions might be accepted as theoretically true, those hypotheses alone cannot be the basis for denying the large majority of all parents vital information which is absolutely necessary to the proper performance of their parental function.

Under the Minnesota law a minor who declares that she is a victim of abuse is exempted from this notice requirement. Furthermore, despite the fact that numerous minors complied with the parental notice requirement of the Minnesota law, there was no showing or finding to demonstrate that even one minor was ever abused or improperly obstructed or prevented from obtaining an abortion as a result of parental notice.

It is unfortunately true that a few parents, unworthy of their trust, abuse their children. In no sense is this unhappy fact unique to the occasion of abortion or to the category of

parents. It could be precipitated by any event or by no event at all. The solution to the problem of child abuse, however, does not lie in wholesale elimination of important parental rights and duties simply because they might in a few cases be abused by some. Were this true, we might also conclude that, because there exist parents who will abuse their children as a result of poor performance in school, no parents may receive school progress or conduct reports.

As recognized by the Court in *Parham v. J. R.*, 442 U.S. 584 (1979):

> As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attests to this. That some parents "may at times be acting against the interests of their children" . . . creates a basis for caution, but it's hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests.

Id. at 602-03 (citations omitted).

The best approach to protection of children from abusive parents is not to replace the parental function wholesale. Rather, it is to identify abusive or neglectful parents, act to protect the children involved, and insist on remedy of the problems of the parents. Subdivision 4 of the act recognizes this need.[18] Other legal means exist in Minnesota for the protection of minors against unlawful treatment by parents.[19]

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[18] This provision forgives the notice requirement in any case where a parent has abused or neglected the child and provides for the reporting of such abuse or neglect to appropriate authorities for investigation.

[19] *See, e.g.*, Minn. Stat. §§ 626.556 (reporting of maltreatment of minors), 260.133-.161 (1988) (procedure, domestic child abuse).

There is simply no necessity to deny parents in general their legal and natural role, without so much as an opportunity to be heard, on the bare allegation that some unknown number of unidentified parents who have not committed prior abuse against the child might commit some legal wrong in the future.

E. The Two-Parent Aspect Of The Notice Requirement Is Not Unduly Burdensome.

The trial court and the dissenting circuit judges concluded that the requirement of notifying *both* parents rendered the statute unduly burdensome in some situations in which a one-parent notification requirement might be upheld. Plainly it is not materially any more burdensome to dispatch two notices rather than one. Thus, if parent notification in general is a valid state requirement, no persuasive reason exists to deny such notice arbitrarily to either parent. For the most part, it appears that this conclusion has no firmer basis than the objection to parent notification generally, *i.e.*, that there may exist some parents who may act in an inappropriate fashion.

For some reason, plaintiffs have singled out non-custodial parents for particular criticism in this regard. Other than evidence to the effect that divorce often involves impaired family communications, no particular explanation is offered for the notion that non-custodial parents should categorically be denied knowledge concerning their children's upbringing and welfare. It cannot be conclusively presumed, however, that a non-custodial parent will automatically take adverse action which could amount to a "veto" of the abortion decision. If anything, a non-custodial parent is in even less of a position to improperly obstruct any abortion decision inas-

much as he or she does not have custody and control of the child.[20]

To the contrary, it is widely recognized that it is beneficial in all but the most extreme cases to support continuing involvement of even non-custodial parents in the lives of their children. *See, e.g., Clark v. Clark*, 346 N.W.2d 383 (Minn. Ct. App. 1984) (abuse of discretion to permit erosion of father's visitation rights); *Spotts v. Spotts*, 197 N.W.2d 370 (Iowa 1972) (best interests of children require continuing association with father absent clear contrary showing); *In re Marriage of McGee*, 613 P.2d 348 (Colo. Ct. App. 1980) (liberal visitation rights favored despite lack of prior contact); *Marciano v. Marciano*, 56 A.D.2d 735, 392 N.Y.S.2d 747 (App. Div. 1977) (visitation should not be denied fathers solely on basis of animosity between parents or stated wishes of child). *See also* testimony of Elissa Benedek, J.A. at 254-55.

Nothing in the record proves that all or even most non-custodial parents are *per se* antagonistic to their daughters' interests or that custodial parents, *per se*, always act in the child's best interests. As noted by the trial judge, a custodial parent's frequent fear is that the daughter's pregnancy may be raised in custody litigation. Finding 70. Hodgson Appendix at 31a. Thus, while eliminating notice to all non-custodial parents might eliminate notice to some who may be "unhelpful," it would also eliminate notice to many who would in fact be concerned and helpful.

Absent adoption or a legal determination that, due to impermissible conduct, parental rights should be terminated, both legal parents of a minor remain her parents with actual

[20] It is important to note that nothing in Minn. Stat. § 144.343, subd. 2, supersedes any restrictions which may exist under any child custody or protective order of court.

and legally recognized concerns in regard to their daughter. To deny either lawful parent important information concerning a child merely at the wish of the child, or an estranged spouse or because the parent is "non-custodial" is to arbitrarily ignore his or her legitimate legal interests in his or her daughter. *Cf. Stanley v. Illinois*, 405 U.S. 645 (1972) (conclusive presumption that unmarried fathers were unsuitable parents unconstitutional).

F. Mandatory Employment Of A Bypass Procedure Impairs The Legitimate Goals Of The Notice Requirement.

As noted above, the objections of plaintiffs and of the district court to requiring parental notice center in general upon the notion that "some parents" reactions may be unhelpful, hostile or even abusive. However, it does not appear that the perceived need to withhold notice from parents is, in all or even most cases, based upon a finding that the parent would in fact take impermissible action or actually prevent the exercise of the abortion decision. In a compilation of 258 cases heard in Ramsey County when the notice/bypass law was in operation, only five percent of the minor petitions even generally asserted a belief that the parents "would force the girl to keep the child." P. Exh. 21, J.A. at 381. Given the confidential, *ex parte* nature of these proceedings and the fact that minors often misapprehend actual parental reaction, it is impossible to know in what portion, if any, of even these cases that assertion was true.

Significantly, the most common single reason asserted for wanting to avoid notice was "fear of damaging parent-child relationship." *Id.* As plaintiff Meadowbrook's co-director Paula Wendt testified, minors seeking to avoid parental notification commonly explain that desire on the basis of "not want[ing]

to ruin a good relationship." J.A. at 114. Similarly, Dr. Hodgson herself testified that minors commonly seek to avoid parental notification as "a matter of love for their parents and they don't want to spoil the relationship that they have with their parents." J.A. at 460.

In other words, in a large proportion of the cases, plaintiffs seek to prevent parental involvement, not because the parents are bad or will fail to perform properly, but for precisely the opposite reason. There is absolutely no support, however, for the proposition that children are or should be entitled to maintain a parent-child relationship based upon deceit or to insist that parents learn only pleasing facts about them or agree with their every action. To the contrary, if parents are to fulfill their role, it is absolutely necessary that they be aware of unpleasant facts concerning their children's behavior and consequent problems. It is precisely in times of crisis, when all is not well with the child, that true parenting is the most important.[21] Abortion clinics, however, seldom, if ever, decline to perform a requested abortion upon a minor without parental notifications due to her immaturity or because they feel that parental involvement would be helpful.

Nor can the courts generally be relied upon to see that parents are entitled to be involved, when they should be, in their daughter's abortion decision, as demonstrated by the fact that all but a very few of the bypass petitions submitted to Minnesota courts were approved. *See* D. Exh. 69, J.A. at 493.

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[21] To the extent that the initial abortion decision itself has been motivated by the desire of the minor to conceal her sexual activity and subsequent pregnancy from her parents, removal of that motivation via assured parental notice can assist in assuring that the abortion decision will ultimately be made upon other, more legitimate bases.

If the legitimate interests of parents and society in providing the best available counsel and support for young girls in crisis is to be furthered, it is essential that the parents have, at the very least, notice of the facts. The result of requiring a summary court bypass mechanism as an alternative to parental notification is often the prevention of communication among parents and children who otherwise enjoy a good relationship. Minnesota's notice requirement should therefore be permitted to stand alone.

CONCLUSION

For the foregoing reasons the court of appeals erred in striking down the parental notice provision of the Minnesota statute. That decision was not compelled by established Supreme Court precedent; it does not result in a balanced recognition of the strong and proper interests of the state and parents in relation to the ultimate rights of minors to make the abortion decision; and it does not, in most circumstances, serve the best interests of minors generally. Defendants therefore urge this court to reverse the court of appeals and hold Minn. Stat. § 144.343, subd. 2, to be valid.

Respectfully Submitted,

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APPENDIX

Minnesota Statutes:

144.343 [PREGNANCY, VENEREAL DISEASE, ALCOHOL OR DRUG ABUSE, ABORTION]*

Subdivision 1. [*Minor's consent valid.*] Any minor may give effective consent for medical, mental and other health services to determine the presence of or to treat pregnancy and conditions associated therewith, venereal disease, alcohol and other drug abuse, and the consent of no other person is required.

Subd. 2. [*Notification concerning abortion.*] Notwithstanding the provisions of section 13.02, subdivision 8, no abortion operation shall be performed upon an unemancipated minor or upon a woman for whom a guardian or conservator has been appointed pursuant to sections 525.54 to 525.551 because of a finding of incompetency, until at least 48 hours after written notice of the pending operation has been delivered in the manner specified in subdivisions 2 to 4.

(a) The notice shall be addressed to the parent at the usual place of abode of the parent and delivered personally to the parent by the physician or an agent.

(b) In lieu of the delivery required by clause (a), notice shall be made by certified mail addressed to the parent at the usual place of abode of the parent with return receipt requested and restricted delivery to the addressee which means postal employee can only deliver the mail to the authorized addressee. Time of delivery shall be deemed to occur at 12 o'clock noon on the next day on which regular mail delivery takes place, subsequent to mailing.

* Brackets denote Minnesota Revisor of Statutes headnotes.

Subd. 3. [*Parent, abortion; definitions.*] For purposes of this section, "parent" means both parents of the pregnant woman if they are both living, one parent of the pregnant woman if only one is living or if the second one cannot be located through reasonably diligent effort, or the guardian or conservator if the pregnant woman has one.

For purposes of this section, "abortion" means the use of any means to terminate the pregnancy of a woman known to be pregnant with knowledge that the termination with those means will, with reasonable likelihood, cause the death of the fetus and "fetus" means any individual human organism from fertilization until birth.

Subd. 4. [*Limitations.*] No notice shall be required under this section if:

(a) The attending physician certifies in the pregnant woman's medical record that the abortion is necessary to prevent the woman's death and there is insufficient time to provide the required notice; or

(b) The abortion is authorized in writing by the person or persons who are entitled to notice; or

(c) The pregnant minor woman declares that she is a victim of sexual abuse, neglect, or physical abuse as defined in section 626.556. Notice of that declaration shall be made to the proper authorities as provided in section 626.556, subdivision 3.

Subd. 5. [*Penalty.*] Performance of an abortion in violation of this section shall be a misdemeanor and shall be grounds for a civil action by a person wrongfully denied notification. A person shall not be held liable under this section if the person establishes by written evidence that the person relied upon evidence sufficient to convince a careful and prudent person that the representations of the pregnant woman

regarding information necessary to comply with this section are bona fide and true, or if the person has attempted with reasonable diligence to deliver notice, but has been unable to do so.

Subd. 6. [*Substitute notification provisions.*] If subdivision 2 of this law is ever temporarily or permanently restrained or enjoined by judicial order, subdivision 2 shall be enforced as though the following paragraph were incorporated as paragraph (c) of that subdivision; provided, however, that if such temporary or permanent restraining order or injunction is ever stayed or dissolved, or otherwise ceases to have effect, subdivision 2 shall have full force and effect, without being modified by the addition of the following substitute paragraph which shall have no force or effect until or unless an injunction or restraining order is again in effect.

(c)(i) If such a pregnant woman elects not to allow the notification of one or both of her parents or guardian or conservator, any judge of a court of competent jurisdiction shall, upon petition, or motion, and after an appropriate hearing, authorize a physician to perform the abortion if said judge determines that the pregnant woman is mature and capable of giving informed consent to the proposed abortion. If said judge determines that the pregnant woman is not mature, or if the pregnant woman does not claim to be mature, the judge shall determine whether the performance of an abortion upon her without notification of her parents, guardian or conservator would be in her best interests and shall authorize a physician to perform the abortion without such notification if said judge concludes that the pregnant woman's best interests would be served thereby.

(ii) Such a pregnant woman may participate in proceedings in the court on her own behalf, and the court may appoint a guardian ad litem for her. The court shall, however, advise

her that she has a right to court appointed counsel, and shall, upon her request, provide her with such counsel.

(iii) Proceedings in the court under this section shall be confidential and shall be given such precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interests of the pregnant woman. A judge of the court who conducts proceedings under this section shall make in writing specific factual findings and legal conclusions supporting the decision and shall order a record of the evidence to be maintained including the judge's own findings and conclusions.

(iv) An expedited confidential appeal shall be available to any such pregnant woman for whom the court denies an order authorizing an abortion without notification. An order authorizing an abortion without notification shall not be subject to appeal. No filing fees shall be required of any such pregnant woman at either the trial or the appellate level. Access to the trial court for the purposes of such a petition or motion, and access to the appellate courts for purposes of making an appeal from denial of the same, shall be afforded such a pregnant woman 24 hours a day, seven days a week.

Subd. 7. [*Severability.*] If any provision, word, phrase or clause of this section or the application thereof to any person or circumstance shall be held invalid, such invalidity shall not affect the provisions, words, phrases, clauses or application of this section which can be given effect without the invalid provision, word, phrase, clause, or application, and to this end the provisions, words, phrases, and clauses of this section are declared to be severable.

260.133 [PROCEDURE; DOMESTIC CHILD ABUSE.]

Subdivision 1. [*Petition.*] The local welfare agency may bring an emergency petition on behalf of minor family or

household members seeking relief from acts of domestic child abuse. The petition shall allege the existence of or immediate and present danger of domestic child abuse, and shall be accompanied by an affidavit made under oath stating the specific facts and circumstances from which relief is sought.

Subd. 2. [*Temporary order.*] If it appears from the notarized petition or by sworn affidavit that there are reasonable grounds to believe the child is in immediate and present danger of domestic child abuse, the court may grant an ex parte temporary order for protection, pending a full hearing. The court may grant relief as it deems proper, including an order:

(1) restraining any party from committing acts of domestic child abuse; or

(2) excluding the alleged abusing party from the dwelling which the family or household members share or from the residence of the child.

However, no order excluding the alleged abusing party from the dwelling may be issued unless the court finds that:

(1) the order is in the best interests of the child or children remaining in the dwelling; and

(2) a remaining adult family or household member is able to care adequately for the child or children in the absence of the excluded party.

Before the temporary order is issued, the local welfare agency shall advise the court and the other parties who are present that appropriate social services will be provided to the family or household members during the effective period of the order.

An ex parte temporary order for protection shall be effective for a fixed period not to exceed 14 days. Within five days of the issuance of the temporary order, the petitioner shall file

a petition with the court pursuant to section 260.131, alleging that the child is in need of protection or services and the court shall give docket priority to the petition.

The court may renew the temporary order for protection one time for a fixed period not to exceed 14 days if a petition alleging that the child is in need of protection or services has been filed with the court and if the court determines, upon informal review of the case file, that the renewal is appropriate.

Subd. 3. [*Service and execution of order.*] Any order issued under this section or section 260.191, subdivision 1b, shall be served personally upon the respondent. Where necessary, the court shall order the sheriff or constable to assist in service or execution of the order.

Subd. 4. [*Modification of order.*] Upon application, notice to all parties, and hearing, the court may modify the terms of an existing order for protection issued under this section or section 260.191, subdivision 1b.

Subd. 5. [*Right to apply for relief.*] The local welfare agency's right to apply for relief on behalf of a child shall not be affected by the child's leaving the dwelling or household to avoid abuse.

Subd. 6. [*Real estate.*] Nothing in this section or section 260.191, subdivision 1b, shall affect the title to real estate.

Subd. 7. [*Other remedies available.*] Any relief ordered under this section or section 260.191, subdivision 1b, shall be in addition to other available civil or criminal remedies.

Subd. 8. [*Copy to law enforcement agency.*] An order for protection granted pursuant to this section or section 260.191, subdivision 1b, shall be forwarded by the court administrator within 24 hours to the local law enforcement agency with jurisdiction over the residence of the child.

Each appropriate law enforcement agency shall make available to other law enforcement officers through a system of verification, information as to the existence and status of any order for protection issued pursuant to this section or section 260.191, subdivision 1b.

260.135 [SUMMONS; NOTICE.]

Subdivision 1. After a petition has been filed and unless the parties hereinafter named voluntarily appear, the court shall set a time for a hearing and shall issue a summons requiring the person who has custody or control of the child to appear with the child before the court at a time and place stated. The summons shall have a copy of the petition attached, and shall advise the parties of the right to counsel and of the consequences of failure to obey the summons. The court shall give docket priority to any child in need of protection or services, neglected and in foster care, or delinquency petition that contains allegations of child abuse over any other case except those delinquency matters where a child is being held in a secure detention facility. As used in this subdivision, "child abuse" has the meaning given it in section 630.36, subdivision 2.

Subd. 2. The court shall have notice of the pendency of the case and of the time and place of the hearing served upon a parent, guardian, or spouse of the child, who has not been summoned as provided in subdivision 1.

Subd. 3. If a petition alleging a child's need for protection or services, or a petition to terminate parental rights is initiated by a person other than a representative of the department of human services or county welfare board, the court administrator shall notify the county welfare board of the pendency of the case and of the time and place appointed.

Subd. 4. The court may issue a subpoena requiring the appearance of any other person whose presence, in the opinion of the court, is necessary.

Subd. 5. If it appears from the notarized petition or by sworn affidavit that there are reasonable grounds to believe the child is in surroundings or conditions which endanger the child's health, safety or welfare and require that the child's custody be immediately assumed by the court, the court may order, by endorsement upon the summons, that the officer serving the summons shall take the child into immediate custody.

260.141 [SERVICE OF SUMMONS, NOTICE.]

Subdivision 1. (a) Service of summons or notice required by section 260.135 shall be made upon the following persons in the same manner in which personal service of summons in civil actions is made:

(1) in all delinquency matters, upon the person having custody or control of the child and upon the child; and

(2) in all other matters, upon the person having custody or control of the child, and upon the child if more than 12 years of age.

Personal service shall be effected at least 24 hours before the time of the hearing; however, it shall be sufficient to confer jurisdiction if service is made at any time before the day fixed in the summons or notice for the hearing, except that the court, if so requested, shall not proceed with the hearing earlier than the second day after the service. If personal service cannot well be made within the state, a copy of the summons or notice may be served on the person to whom it is directed by delivering a copy thereof to such person personally outside the state. Such service if made personally outside the state shall be sufficient to confer jurisdiction; providing however it be made at least five days before the date fixed for hearing in such summons or notice.

(b) If the court is satisfied that personal service of the summons or notice cannot well be made, it shall make an order providing for the service of summons or notice by certified mail addressed to the last known addresses of such persons, and by one weeks published notice as provided in section 645.11. A copy of the notice shall be sent by certified mail at least five days before the time of the hearing or 14 days if mailed to addresses outside the state.

(c) Notification to the county welfare board required by section 260.135, subdivision 3, shall be in such manner as the court may direct.

Subd. 2. Service of summons, notice, or subpoena required by sections 260.135 to 260.231 shall be made by any suitable person under the direction of the court, and upon request of the court shall be made by a probation officer or any peace officer. The fees and mileage of witnesses shall be paid by the county if the subpoena is issued by the court on its own motion or at the request of the county attorney. All other fees shall be paid by the party requesting the subpoena unless otherwise ordered by the court.

Subd. 3. Proof of the service required by this section shall be made by the person having knowledge thereof.

260.145 [FAILURE TO OBEY SUMMONS OR SUBPOENA; CONTEMPT, ARREST.]

If any person personally served with summons or subpoena fails, without reasonable cause, to appear or bring the minor, the person may be proceeded against for contempt of court or the court may issue a warrant for the person's arrest, or both. In any case when it appears to the court that the service will be ineffectual, or that the welfare of the minor requires that

the minor be brought forthwith into the custody of the court, the court may issue a warrant for the minor.

260.151 [INVESTIGATION; PHYSICAL AND MENTAL EXAMINATION.]

Subdivision 1. Upon request of the court the county welfare board or probation officer shall investigate the personal and family history and environment of any minor coming within the jurisdiction of the court under section 260.111 and shall report its findings to the court. The court may order any minor coming within its jurisdiction to be examined by a duly qualified physician, psychiatrist, or psychologist appointed by the court. With the consent of the commissioner of corrections and agreement of the county to pay the costs thereof, the court may, by order, place a minor coming within its jurisdiction in an institution maintained by the commissioner for the detention, diagnosis, custody and treatment of persons adjudicated to be delinquent, in order that the condition of the minor be given due consideration in the disposition of the case. Adoption investigations shall be conducted in accordance with the laws relating to adoptions. Any funds received under the provisions of this subdivision shall not cancel until the end of the fiscal year immediately following the fiscal year in which the funds were received. The funds are available for use by the commissioner of corrections during that period and are hereby appropriated annually to the commissioner of corrections as reimbursement of the costs of providing these services to the juvenile courts.

Subd. 2. The court may proceed as described in subdivision 1 only after a petition has been filed and, in delinquency cases, after the child has appeared before the court or a court appointed referee and has been informed of the allegations contained in the petition. However, when the child denies being

delinquent before the court or court appointed referee, the investigation or examination shall not be conducted before a hearing has been held as provided in section 260.155.

260.155 [HEARING.]

Subdivision 1. [*General.*] Except for hearings arising under section 260.261, hearings on any matter shall be without a jury and may be conducted in an informal manner. The rules of evidence promulgated pursuant to section 480.0591 and the law of evidence shall apply in adjudicatory proceedings involving a child alleged to be delinquent, in need of protection or services under section 260.015, subdivision 2a, clause (11) or (12), or a juvenile petty offender, and hearings conducted pursuant to section 260.125 except to the extent that the rules themselves provide that they do not apply. Hearings may be continued or adjourned from time to time and, in the interim, the court may make any orders as it deems in the best interests of the minor in accordance with the provisions of sections 260.011 to 260.301. The court shall exclude the general public from these hearings and shall admit only those persons who, in the discretion of the court, have a direct interest in the case or in the work of the court; except that, the court shall open the hearings to the public in delinquency proceedings where the child is alleged to have committed an offense or has been proven to have committed an offense that would be a felony if committed by an adult and the child was at least 16 years of age at the time of the offense. In all delinquency cases a person named in the charging clause of the petition as a person directly damaged in person or property shall be entitled, upon request, to be notified by the court administrator in writing, at the named person's last known address, of (1) the date of the reference or adjudicatory hearings, and (2) the disposition of the case. Adoption hearings shall be conducted in accordance with the provisions of laws relating to adoptions.

Subd. 1a. [*Right to participate in proceedings.*] A child who is the subject of a petition, and the parents, guardian, or lawful custodian of the child have the right to participate in all proceedings on a petition. Any grandparent of the child has a right to participate in the proceedings to the same extent as a parent, if the child has lived with the grandparent within the two years preceding the filing of the petition. At the first hearing following the filing of a petition, the court shall ask whether the child has lived with a grandparent within the last two years, except that the court need not make this inquiry if the petition states that the child did not live with a grandparent during this time period. Failure to notify a grandparent of the proceedings is not a jurisdictional defect.

Subd. 2. [*Appointment of counsel.*] The minor, parent, guardian or custodian have the right to effective assistance of counsel. If they desire counsel but are unable to employ it, the court shall appoint counsel to represent the minor or the parents or guardian in any other case in which it feels that such an appointment is desirable.

Subd. 3. [*County attorney.*] Except in adoption proceedings, the county attorney shall present the evidence upon request of the court.

Subd. 4. [*Guardian ad litem.*] (a) The court shall appoint a guardian ad litem to protect the interests of the minor when it appears, at any stage of the proceedings, that the minor is without a parent or guardian, or that the minor's parent is a minor or incompetent, or that the parent or guardian is indifferent or hostile to the minor's interests, and in every proceeding alleging a child's need for protection or services under section 260.015, subdivision 2a, clauses (1) to (10). In any other case the court may appoint a guardian ad litem to protect the interests of the minor when the court feels that such ar appointment is desirable. The court shall appoint the guard-

ian ad litem on its own motion or in the manner provided for the appointment of a guardian ad litem in the district court.

(b) The court may waive the appointment of a guardian ad litem pursuant to clause (a), whenever counsel has been appointed pursuant to subdivision 2 or is retained otherwise, and the court is satisfied that the interests of the minor are protected.

(c) In appointing a guardian ad litem pursuant to clause (a), the court shall not appoint the party, or any agent or employee thereof, filing a petition pursuant to section 260.131.

Subd. 4a. [*Examination of child.*] In any child in need of protection or services proceeding, neglected and in foster care, or termination of parental rights proceeding the court may, on its own motion or the motion of any party, take the testimony of a child witness informally when it is in the child's best interests to do so. Informal procedures that may be used by the court include taking the testimony of a child witness outside the courtroom. The court may also require counsel for any party to the proceeding to submit questions to the court before the child's testimony is taken, and to submit additional questions to the court for the witness after questioning has been completed. The court may excuse the presence of the child's parent, guardian, or custodian from the room where the child is questioned in accordance with subdivision 5.

Subd. 5. [*Waiving the presence of child, parent.*] Except in delinquency proceedings, the court may waive the presence of the minor in court at any stage of the proceedings when it is in the best interests of the minor to do so. In a delinquency proceeding, after the child is found to be delinquent, the court may excuse the presence of the child from the hearing when it is in the best interests of the child to do so. In any proceeding the court may temporarily excuse the presence of the parent

or guardian of a minor from the hearing when it is in the best interests of the minor to do so. The attorney or guardian ad litem, if any, has the right to continue to participate in proceedings during the absence of the minor, parent, or guardian.

Subd. 6. [*Rights of the parties at the hearing.*] The minor and the minor's parent, guardian, or custodian are entitled to be heard, to present evidence material to the case, and to cross examine witnesses appearing at the hearing.

Subd. 7. [*Factors in determining neglect.*] In determining whether a child is neglected and in foster care, the court shall consider, among other factors, the following:

(1) the length of time the child has been in foster care;

(2) the effort the parent has made to adjust circumstances, conduct, or condition to make it in the child's best interest to be returned to the parent's home in the foreseeable future, including the use of rehabilitative services offered to the parent;

(3) whether the parent has visited the child within the three months preceding the filing of the petition, unless extreme financial or physical hardship or treatment for mental disability or chemical dependency or other good cause prevented the parent from visiting the child or it was not in the best interests of the child to be visited by the parent;

(4) the maintenance of regular contact or communication with the agency or person temporarily responsible for the child;

(5) the appropriateness and adequacy of services provided or offered to the parent to facilitate a reunion;

(6) whether additional services would be likely to bring about lasting parental adjustment enabling a return of the child to the parent within an ascertainable period of time; and

(7) the nature of the effort made by the responsible social service agency to rehabilitate and reunite the family.

Subd. 8. [*Waiver.*] (a) Waiver of any right which a child has under this chapter must be an express waiver voluntarily and intelligently made by the child after the child has been fully and effectively informed of the right being waived. If a child is under 12 years of age, the child's parent, guardian or custodian shall give any waiver or offer any objection contemplated by this chapter.

(b) Waiver of a child's right to be represented by counsel provided under the juvenile court rules must be an express waiver voluntarily and intelligently made by the child after the child has been fully and effectively informed of the right being waived. In determining whether a child has voluntarily and intelligently waived the right to counsel, the court shall look to the totality of the circumstances which includes but is not limited to the child's age, maturity, intelligence, education, experience, and ability to comprehend, and the presence and competence of the child's parents, guardian, or guardian ad litem. If the court accepts the child's waiver, it shall state on the record the findings and conclusions that form the basis for its decision to accept the waiver.

260.156 [CERTAIN OUT-OF-COURT STATEMENTS ADMISSIBLE.]

An out-of-court statement made by a child under the age of ten years, or a child ten years of age or older who is mentally impaired, as defined under section 609.341, subdivision 6, alleging, explaining, denying, or describing any act of sexual contact or penetration performed with or on the child or any act of physical abuse or neglect of the child by another, not otherwise admissible by statute or rule of evidence, is admissible in evidence in any child in need of protection or services, neglected and in foster care, or domestic child abuse proceeding or any proceeding for termination of parental rights if:

(a) the court finds that the time, content, and circumstances of the statement and the reliability of the person to whom the statement is made provide sufficient indicia of reliability; and

(b) the proponent of the statement notifies other parties of an intent to offer the statement and the particulars of the statement sufficiently in advance of the proceeding at which the proponent intends to offer the statement into evidence, to provide the parties with a fair opportunity to meet the statement.

For purposes of this section, an out-of-court statement includes a video, audio, or other recorded statement.

260.16 [Repealed, 1959 c 685 s 53]

260.161 [RECORDS.]

Subdivision 1. The juvenile court judge shall keep such minutes and in such manner as the court deems necessary and proper. The court shall keep and maintain records pertaining to delinquent adjudications until the person reaches the age of 23 years and shall release the records on an individual to a requesting adult court for purposes of sentencing, or to an adult court or juvenile court as required by the right of confrontation of either the United States Constitution or the Minnesota Constitution. The juvenile court shall provide, upon the request of any other juvenile court, copies of the records concerning adjudications involving the particular child. The court shall also keep an index in which files pertaining to juvenile matters shall be indexed under the name of the child. After the name of each file shall be shown the file number and, if ordered by the court, the book and page of the register in which the documents pertaining to such file are listed. The court shall also keep a register properly indexed in which shall be listed under the name of the child all documents filed pertaining to

the child and in the order filed. The list shall show the name of the document and the date of filing thereof. The juvenile court legal records shall be deposited in files and shall include the petition, summons, notice, findings, orders, decrees, judgments, and motions and such other matters as the court deems necessary and proper. The legal records maintained in this file shall be open at all reasonable times to the inspection of any child to whom the records relate, and to the child's parent and guardian.

Subd. 2. Except as provided in this subdivision and in subdivision 1, and except for legal records arising from proceedings that are public under section 260.155, subdivision 1, none of the records of the juvenile court and none of the records relating to an appeal from a nonpublic juvenile court proceeding, except the written appellate opinion, shall be open to public inspection or their contents disclosed except (a) by order of a court or (b) as required by sections 611A.03, 611A.04, and 611A.06. The records of juvenile probation officers and county home schools are records of the court for the purposes of this subdivision. This subdivision applies to all proceedings under this chapter, including appeals from orders of the juvenile court, except that this subdivision does not apply to proceedings under section 260.255, 260.261, or 260.315 when the proceeding involves an adult defendant. The court shall maintain the confidentiality of adoption files and records in accordance with the provisions of laws relating to adoptions. In juvenile court proceedings any report or social history furnished to the court shall be open to inspection by the attorneys of record and the guardian ad litem a reasonable time before it is used in connection with any proceeding before the court.

When a judge of a juvenile court, or duly authorized agent of the court, determines under a proceeding under this chapter

that a child has violated a state or local law, ordinance, or regulation pertaining to the operation of a motor vehicle on streets and highways, except parking violations, the judge or agent shall immediately report the violation to the commissioner of public safety. The report must be made on a form provided by the department of public safety and must contain the information required under section 169.95.

Subd. 3. (a) Peace officers' records of children shall be kept separate from records of persons 18 years of age or older and shall not be open to public inspection or their contents disclosed to the public except (1) by order of the juvenile court, or (2) as required by section 126.036, or (3) as authorized under chapter 13; except that traffic investigation reports may be open to inspection by a person who has sustained physical harm or economic loss as a result of the traffic accident. No photographs of a child taken into custody may be taken without the consent of the juvenile court unless the child is alleged to have violated section 169.121 or 169.129. Any person violating any of the provisions of this subdivision shall be guilty of a misdemeanor.

(b) Nothing in this subdivision prohibits the exchange of information by law enforcement agencies if the exchanged information is pertinent and necessary to the requesting agency in initiating, furthering, or completing a criminal investigation.

Subd. 4. [*Court record released to prosecutor.*] If a prosecutor has probable cause to believe that a person has committed a gross misdemeanor violation of section 169.121 or has violated section 169.129, and that a prior juvenile court adjudication forms, in part, the basis for the current violation, the prosecutor may file an application with the court having jurisdiction over the criminal matter attesting to this probable cause determination and seeking the relevant juvenile court

records. The court shall transfer the application to the juvenile court where the requested records are maintained, and the juvenile court shall release to the prosecutor any records relating to the person's prior juvenile traffic adjudication, including a transcript, if any, of the court's advisory of the right to counsel and the person's exercise or waiver of that right.

626.556 [REPORTING OF MALTREATMENT OF MINORS.]

Subdivision 1. [*Public policy.*] The legislature hereby declares that the public policy of this state is to protect children whose health or welfare may be jeopardized through physical abuse, neglect or sexual abuse; to strengthen the family and make the home, school, and community safe for children by promoting responsible child care in all settings; and to provide, when necessary, a safe temporary or permanent home environment for physically or sexually abused children.

In addition, it is the policy of this state to require the reporting of neglect, physical or sexual abuse of children in the home, school, and community settings; to provide for the voluntary reporting of abuse or neglect of children; to require the assessment and investigation of the reports; and to provide protective and counseling services in appropriate cases.

Subd. 2. [*Definitions.*] As used in this section, the following terms have the meanings given them unless the specific content indicates otherwise:

(a) "Sexual abuse" means the subjection by a person responsible for the child's care, or by a person in a position of authority, as defined in section 609.341, subdivision 10, to any act which constitutes a violation of section 609.342, 609.343, 609.344, or 609.345. Sexual abuse also includes any act which involves a minor which constitutes a violation of sections 609.321 to 609.324 or 617.246.

(b) "Person responsible for the child's care" means (1) an individual functioning within the family unit and having responsibilities for the care of the child such as a parent, guardian, or other person having similar care responsibilities, or (2) an individual functioning outside the family unit and having responsibilities for the care of the child such as a teacher, school administrator, or other lawful custodian of a child having either full-time or short-term care responsibilities including, but not limited to, day care, babysitting whether paid or unpaid, counseling, teaching, and coaching.

(c) "Neglect" means failure by a person responsible for a child's care to supply a child with necessary food, clothing, shelter or medical care when reasonably able to do so or failure to protect a child from conditions or actions which imminently and seriously endanger the child's physical or mental health when reasonably able to do so. Nothing in this section shall be construed to (1) mean that a child is neglected solely because the child's parent, guardian, or other person responsible for the child's care in good faith selects and depends upon spiritual means or prayer for treatment or care of disease or remedial care of the child, or (2) impose upon persons, not otherwise legally responsible for providing a child with necessary food, clothing, shelter, or medical care, a duty to provide that care. Neglect also means "medical neglect" as defined in section 260.015, subdivision 10, clause (e).

(d) "Physical abuse" means any physical injury inflicted by a person responsible for the child's care on a child other than by accidental means, or any physical injury that cannot reasonably be explained by the child's history of injuries, or any aversive and deprivation procedures that have not been authorized under section 245.825.

(e) "Report" means any report received by the local welfare agency, police department, or county sheriff pursuant to this section.

(f) "Facility" means a day care facility, residential facility, agency, hospital, sanitarium, or other facility or institution required to be licensed pursuant to sections 144.50 to 144.58, 241.021, or 245.781 to 245.812.

(g) "Operator" means an operator or agency as defined in section 245A.02.

(h) "Commissioner" means the commissioner of human services.

(i) "Assessment" includes authority to interview the child, the person or persons responsible for the child's care, the alleged perpetrator, and any other person with knowledge of the abuse or neglect for the purpose of gathering the facts, assessing the risk to the child, and formulating a plan.

(j) "Practice of social services," for the purposes of subdivision 3, includes but is not limited to employee assistance counseling and the provision of guardian ad litem services.

Subd. 3. [*Persons mandated to report.*] (a) A person who knows or has reason to believe a child is being neglected or physically or sexually abused, or has been neglected or physically or sexually abused within the preceding three years, shall immediately report the information to the local welfare agency, police department, or the county sheriff if the person is:

(1) a professional or professional's delegate who is engaged in the practice of the healing arts, social services, hospital administration, psychological or psychiatric treatment, child care, education, or law enforcement; or

(2) employed as a member of the clergy and received the information while engaged in ministerial duties, provided that

a member of the clergy is not required by this subdivision to report information that is otherwise privileged under section 595.02, subdivision 1, paragraph (c).

The police department or the county sheriff, upon receiving a report, shall immediately notify the local welfare agency orally and in writing. The local welfare agency, upon receiving a report, shall immediately notify the local police department or the county sheriff orally and in writing. The county sheriff and the head of every local welfare agency and police department shall each designate a person within their agency, department, or office who is responsible for ensuring that the notification duties of this paragraph and paragraph (b) are carried out. Nothing in this subdivision shall be construed to require more than one report from any institution, facility, school, or agency.

(b) Any person may voluntarily report to the local welfare agency, police department, or the county sheriff if the person knows, has reason to believe, or suspects a child is being or has been neglected or subjected to physical or sexual abuse. The police department or the county sheriff, upon receiving a report, shall immediately notify the local welfare agency orally and in writing. The local welfare agency, upon receiving a report, shall immediately notify the local police department or the county sheriff orally and in writing.

(c) A person mandated to report physical or sexual child abuse or neglect occurring within a licensed facility shall report the information to the agency responsible for licensing the facility. A health or corrections agency receiving a report may request the local welfare agency to provide assistance pursuant to subdivisions 10, 10a, and 10b.

(d) Any person mandated to report shall, upon request to the local welfare agency, receive a summary of the disposition

of any report made by that reporter, unless release would be detrimental to the best interests of the child. Any person who is not mandated to report shall, upon request to the local welfare agency, receive a concise summary of the disposition of any report made by that reporter, unless release would be detrimental to the best interests of the child.

(e) For purposes of this subdivision, "immediately" means as soon as possible but in no event longer than 24 hours.

Subd. 3a. [*Report of deprivation of parental rights.*] A person mandated to report under subdivision 3, who knows or has reason to know of a violation of section 609.26, shall report the information to the local police department or the county sheriff. Receipt by a local welfare agency of a report or notification of a report of a violation of section 609.26 shall not be construed to invoke the duties of subdivision 10, 10a, or 10b.

Subd. 4. [*Immunity from liability.*] (a) The following persons are immune from any civil or criminal liability that otherwise might result from their actions, if they are acting in good faith:

(1) any person making a voluntary or mandated report under subdivision 3 or assisting in an assessment under this section;

(2) any social worker or supervisor employed by a local welfare agency complying with subdivision 10d; and

(3) any public or private school, facility as defined in subdivision 2, or the employee of any public or private school or facility who permits access by a local welfare agency or local law enforcement agency and assists in an investigation or assessment pursuant to subdivision 10.

(b) A person who is a supervisor or social worker employed by a local welfare agency complying with subdivisions

10 and 11 or any related rule or provision of law is immune from any civil or criminal liability that might otherwise result from the person's actions, if the person is acting in good faith and exercising due care.

(c) This subdivision does not provide immunity to any person for failure to make a required report or for committing neglect, physical abuse, or sexual abuse of a child.

Subd. 4a. [*Retaliation prohibited.*] (a) An employer of any person required to make reports under subdivision 3 shall not retaliate against the person for reporting in good faith abuse or neglect pursuant to this section, or against a child with respect to whom a report is made, because of the report.

(b) The employer of any person required to report under subdivision 3 who retaliates against the person because of a report of abuse or neglect is liable to that person for actual damages and, in addition, a penalty up to $1,000.

(c) There shall be a rebuttable presumption that any adverse action within 90 days of a report is retaliatory. For purposes of this paragraph, the term "adverse action" refers to action taken by an employer of a person required to report under subdivision 3 which is involved in a report against the person making the report or the child with respect to whom the report was made because of the report, and includes, but is not limited to:

(1) discharge, suspension, termination, or transfer from the facility, institution, school, or agency;

(2) discharge from or termination of employment;

(3) demotion or reduction in remuneration for services; or

(4) restriction or prohibition of access to the facility, institution, school, agency, or persons affiliated with it.

Subd. 5. [*Malicious and reckless reports.*] Any person who knowingly or recklessly makes a false report under the provi-

sions of this section shall be liable in a civil suit for any actual damages suffered by the person or persons so reported and for any punitive damages set by the court or jury.

Subd. 6. [*Failure to report.*] A person mandated by this section to report who knows or has reason to believe that a child is neglected or physically or sexually abused, as defined in subdivision 2, or has been neglected or physically or sexually abused within the preceding three years, and fails to report is guilty of a misdemeanor.

Subd. 6a. [*Failure to notify.*] If a local welfare agency receives a report under subdivision 3, paragraph (a) or (b) and fails to notify the local police department or county sheriff as required by subdivision 3, paragraph (a) or (b), the person within the agency who is responsible for ensuring that notification is made shall be subject to disciplinary action in keeping with the agency's existing policy or collective bargaining agreement on discipline of employees. If a local police department or a county sheriff receives a report under subdivision 3, paragraph (a) or (b) and fails to notify the local welfare agency as required by subdivision 3, paragraph (a) or (b), the person within the police department or county sheriff's office who is responsible for ensuring that notification is made shall be subject to disciplinary action in keeping with the agency's existing policy or collective bargaining agreement on discipline of employees.

Subd. 7. [*Report.*] An oral report shall be made immediately by telephone or otherwise. An oral report made by a person required under subdivision 3 to report shall be followed within 72 hours, exclusive of weekends and holidays, by a report in writing to the appropriate police department, the county sheriff or local welfare agency. Any report shall be of sufficient content to identify the child, any person believed to be

responsible for the abuse or neglect of the child if the person is known, the nature and extent of the abuse or neglect and the name and address of the reporter. Written reports received by a police department or the county sheriff shall be forwarded immediately to the local welfare agency. The police department or the county sheriff may keep copies of reports received by them. Copies of written reports received by a local welfare department shall be forwarded immediately to the local police department or the county sheriff.

A written copy of a report maintained by personnel of agencies, other than welfare or law enforcement agencies, which are subject to chapter 13 shall be confidential. An individual subject of the report may obtain access to the original report as provided by subdivision 11.

Subd. 8. [*Evidence not privileged.*] No evidence relating to the neglect or abuse of a child or to any prior incidents of neglect or abuse involving any of the same persons accused of neglect or abuse shall be excluded in any proceeding arising out of the alleged neglect or physical or sexual abuse on the grounds of privilege set forth in section 595.02, subdivision 1, paragraph (a), (d), or (g).

Subd. 9. [*Mandatory reporting to a medical examiner or coroner.*] When a person required to report under the provisions of subdivision 3 knows or has reason to believe a child has died as a result of neglect or physical or sexual abuse, the person shall report that information to the appropriate medical examiner or coroner instead of the local welfare agency, police department, or county sheriff. Medical examiners or coroners shall notify the local welfare agency or police department or county sheriff in instances in which they believe that the child has died as a result of neglect or physical or sexual abuse. The medical examiner or coroner shall complete an investigation as soon as feasible and report the findings to the police department or county sheriff and the local welfare agency. If the child was receiving services or treatment for mental illness, mental retardation or a related condition, chemical dependency, or emotional disturbance from an agency, facility, or program as defined in section 245.91, the medical examiner or coroner shall also notify and report findings to the ombudsman established under sections 245.91 to 245.97.

Subd. 10. [*Duties of local welfare agency and local law enforcement agency upon receipt of a report.*] (a) If the report alleges neglect, physical abuse, or sexual abuse by a parent, guardian, or individual functioning within the family unit as a person responsible for the child's care, the local welfare agency shall immediately conduct an assessment and offer protective social services for purposes of preventing further abuses, safeguarding and enhancing the welfare of the abused or neglected minor, and preserving family life whenever possible. If the report alleges a violation of a criminal statute involving sexual abuse or physical abuse, the local law enforcement agency and local welfare agency shall coordinate the planning and execution of their respective investigation and assessment efforts to avoid a duplication of fact-finding efforts and multiple interviews. Each agency shall prepare a separate report of the results of its investigation. When necessary the local welfare agency shall seek authority to remove the child from the custody of a parent, guardian, or adult with whom the child is living. In performing any of these duties, the local welfare agency shall maintain appropriate records.

(b) When a local agency receives a report or otherwise has information indicating that a child who is a client, as defined in section 245.91, has been the subject of physical abuse or neglect at an agency, facility, or program as defined in

section 245.91, it shall, in addition to its other duties under this section, immediately inform the ombudsman established under sections 245.91 to 245.97.

(c) Authority of the local welfare agency responsible for assessing the child abuse report and of the local law enforcement agency for investigating the alleged abuse includes, but is not limited to, authority to interview, without parental consent, the alleged victim and any other minors who currently reside with or who have resided with the alleged perpetrator. The interview may take place at school or at any facility or other place where the alleged victim or other minors might be found and may take place outside the presence of the perpetrator or parent, legal custodian, guardian, or school official. Except as provided in this paragraph, the parent, legal custodian, or guardian shall be notified by the responsible local welfare or law enforcement agency no later than the conclusion of the investigation or assessment that this interview has occurred. Notwithstanding rule 49.02 of the Minnesota rules of procedure for juvenile courts, the juvenile court may, after hearing on an ex parte motion by the local welfare agency, order that, where reasonable cause exists, the agency withhold notification of this interview from the parent, legal custodian, or guardian. If the interview took place or is to take place on school property, the order shall specify that school officials may not disclose to the parent, legal custodian, or guardian the contents of the notification of intent to interview the child on school property, as provided under this paragraph, and any other related information regarding the interview that may be a part of the child's school record. A copy of the order shall be sent by the local welfare or law enforcement agency to the appropriate school official.

(d) When the local welfare or local law enforcement agency determines that an interview should take place on school property, written notification of intent to interview the child on school property must be received by school officials prior to the interview. The notification shall include the name of the child to be interviewed, the purpose of the interview, and a reference to the statutory authority to conduct an interview on school property. For interviews conducted by the local welfare agency, the notification shall be signed by the chair of the county welfare board or the chair's designee. The notification shall be private data on individuals subject to the provisions of this paragraph. School officials may not disclose to the parent, legal custodian, or guardian the contents of the notification or any other related information regarding the interview until notified in writing by the local welfare or law enforcement agency that the investigation or assessment has been concluded. Until that time, the local welfare or law enforcement agency shall be solely responsible for any disclosures regarding the nature of the assessment or investigation.

Except where the alleged perpetrator is believed to be a school official or employee, the time and place, and manner of the interview on school premises shall be within the discretion of school officials, but the local welfare or law enforcement agency shall have the exclusive authority to determine who may attend the interview. The conditions as to time, place, and manner of the interview set by the school officials shall be reasonable and the interview shall be conducted not more than 24 hours after the receipt of the notification unless another time is considered necessary by agreement between the school officials and the local welfare or law enforcement agency. Where the school fails to comply with the provisions of this paragraph, the juvenile court may order the school to comply.

Every effort must be made to reduce the disruption of the educational program of the child, other students, or school staff when an interview is conducted on school premises.

(e) Where the perpetrator or a person responsible for the care of the alleged victim or other minor prevents access to the victim or other minor by the local welfare agency, the juvenile court may order the parents, legal custodian, or guardian to produce the alleged victim or other minor for questioning by the local welfare agency or the local law enforcement agency outside the presence of the perpetrator or any person responsible for the child's care at reasonable places and times as specified by court order.

(f) Before making an order under paragraph (d), the court shall issue an order to show cause, either upon its own motion or upon a verified petition, specifying the basis for the requested interviews and fixing the time and place of the hearing. The order to show cause shall be served personally and shall be heard in the same manner as provided in other cases in the juvenile court. The court shall consider the need for appointment of a guardian ad litem to protect the best interests of the child. If appointed, the guardian ad litem shall be present at the hearing on the order to show cause.

(g) The commissioner, the ombudsman for mental health and mental retardation, the local welfare agencies responsible for investigating reports, and the local law enforcement agencies have the right to enter facilities as defined in subdivision 2 and to inspect and copy the facility's records, including medical records, as part of the investigation. Notwithstanding the provisions of chapter 13, they also have the right to inform the facility under investigation that they are conducting an investigation, to disclose to the facility the names of the individuals under investigation for abusing or neglecting a

child, and to provide the facility with a copy of the report and the investigative findings.

Subd. 10a. [*Abuse outside the family unit.*] If the report alleges neglect, physical abuse, or sexual abuse by a person responsible for the child's care functioning outside the family unit in a setting other than a facility as defined in subdivision 2, the local welfare agency shall immediately notify the appropriate law enforcement agency, which shall conduct an investigation of the alleged abuse or neglect. The local welfare agency shall offer appropriate social services for the purpose of safeguarding and enhancing the welfare of the abused or neglected minor.

Subd. 10b. [*Duties of commissioner; neglect or abuse in a facility.*] (a) The commissioner shall immediately investigate if the report alleges that:

(1) a child who is in the care of a facility as defined in subdivision 2 is neglected, physically abused, or sexually abused by an individual in that facility, or has been so neglected or abused by an individual in that facility within the three years preceding the report; or

(2) a child was neglected, physically abused, or sexually abused by an individual in a facility defined in subdivision 2, while in the care of that facility within the three years preceding the report.

The commissioner shall arrange for the transmittal to the commissioner of reports received by local agencies and may delegate to a local welfare agency the duty to investigate reports. In conducting an investigation under this section, the commissioner has the powers and duties specified for local welfare agencies under this section. The commissioner or local welfare agency may interview any children who are or have

been in the care of a facility under investigation and their parents, guardians, or legal custodians.

(b) Prior to any interview, the commissioner or local welfare agency shall notify the parent, guardian, or legal custodian of a child who will be interviewed in the manner provided for in subdivision 10d, paragraph (a). If reasonable efforts to reach the parent, guardian, or legal custodian of a child in an out-of-home placement have failed, the child may be interviewed if there is reason to believe the interview is necessary to protect the child or other children in the facility. The commissioner or local agency must provide the information required in this subdivision to the parent, guardian, or legal custodian of a child interviewed without parental notification as soon as possible after the interview. When the investigation is completed, any parent, guardian, or legal custodian notified under this subdivision shall receive the written memorandum provided for in subdivision 10d, paragraph (c).

Subd. 10c. [*Duties of the local social service agency upon receipt of a report of medical neglect.*] If the report alleges medical neglect as defined in section 260.015, subdivision 10, clause (e), the local welfare agency shall, in addition to its other duties under this section, immediately consult with designated hospital staff and with the parents of the infant to verify that appropriate nutrition, hydration, and medication are being provided; and shall immediately secure an independent medical review of the infant's medical charts and records and, if necessary, seek a court order for an independent medical examination of the infant. If the review or examination leads to a conclusion of medical neglect, the agency shall intervene on behalf of the infant by initiating legal proceedings under section 260.131 and by filing an expedited motion to prevent the withholding of medically indicated treatment.

Subd. 10d. [*Notification of neglect or abuse in a facility.*] (a) When a report is received that alleges neglect, physical abuse, or sexual abuse of a child while in the care of a facility required to be licensed pursuant to sections 245.781 to 245.812, the commissioner or local welfare agency investigating the report shall provide the following information to the parent, guardian, or legal custodian of a child alleged to have been neglected, physically abused, or sexually abused: the name of the facility; the fact that a report alleging neglect, physical abuse, or sexual abuse of a child in the facility has been received; the nature of the alleged neglect, physical abuse, or sexual abuse; that the agency is conducting an investigation; any protective or corrective measures being taken pending the outcome of the investigation; and that a written memorandum will be provided when the investigation is completed.

(b) The commissioner or local welfare agency may also provide the information in paragraph (a) to the parent, guardian, or legal custodian of any other child in the facility if the investigative agency knows or has reason to believe the alleged neglect, physical abuse, or sexual abuse has occurred. In determining whether to exercise this authority, the commissioner or local welfare agency shall consider the seriousness of the alleged neglect, physical abuse, or sexual abuse; the number of children allegedly neglected, physically abused, or sexually abused; the number of alleged perpetrators; and the length of the investigation. The facility shall be notified whenever this discretion is exercised.

(c) When the commissioner or local welfare agency has completed its investigation, every parent, guardian, or legal custodian notified of the investigation by the commissioner or local welfare agency shall be provided with the following information in a written memorandum: the name of the facility

investigated; the nature of the alleged neglect, physical abuse, or sexual abuse; the investigator's name; a summary of the investigation findings; a statement whether maltreatment was found; and the protective or corrective measures that are being or will be taken. The memorandum shall be written in a manner that protects the identity of the reporter and the child and shall not contain the name, or to the extent possible, reveal the identity of the alleged perpetrator or of those interviewed during the investigation. The commissioner or local welfare agency shall also provide the written memorandum to the parent, guardian, or legal custodian of each child in the facility if maltreatment is determined to exist.

Subd. 10e. [*Determinations.*] Upon the conclusion of every assessment or investigation it conducts, the local welfare agency shall make two determinations: first, whether maltreatment has occurred; and second, whether child protective services are needed.

(a) For the purposes of this subdivision, "maltreatment" means any of the following acts or omissions committed by a person responsible for the child's care:

(1) an assault, as defined in section 609.02, subdivision 10, or any physical contact not exempted by section 609.379, where the assault or physical contact is either severe or recurring and causes either injury or significant risk of injury to the child;

(2) neglect as defined in subdivision 2, paragraph (c); or

(3) sexual abuse as defined in subdivision 2, paragraph (a).

(b) For the purposes of this subdivision, a determination that child protective services are needed means that the local welfare agency has documented conditions during the assessment or investigation sufficient to cause a child protection

worker, as defined in section 626.559, subdivision 1, to conclude that a child is at significant risk of maltreatment if protective intervention is not provided and that the individuals responsible for the child's care have not taken or are not likely to take actions to protect the child from maltreatment or risk of maltreatment.

Subd. 10f. [*Notice of determinations.*] Within ten working days of the conclusion of an assessment the local welfare agency shall notify the parent or guardian of the child of the determinations. Within ten working days of completing an investigation of a licensed facility, the local welfare agency shall notify the person alleged to be maltreating the child, the director of the facility, and the parent or guardian of the child of the determinations. In addition to the determinations, the notice shall include the length of time that the records will be kept under subdivision 11c. When there is no determination of either maltreatment or a need for services, the notice shall also include the alleged perpetrator's right to have the records destroyed.

Subd. 11. [*Records.*] Except as provided in subdivisions 10b, 10d, and 11b, all records concerning individuals maintained by a local welfare agency under this section, including any written reports filed under subdivision 7, shall be private data on individuals, except insofar as copies of reports are required by subdivision 7 to be sent to the local police department or the county sheriff. Report records maintained by any police department or the county sheriff shall be private data on individuals except the reports shall be made available to the investigating, petitioning, or prosecuting authority. The welfare board shall make available to the investigating, petitioning, or prosecuting authority any records which contain information relating to a specific incident of neglect or abuse which is

under investigation, petition, or prosecution and information relating to any prior incidents of neglect or abuse involving any of the same persons. The records shall be collected and maintained in accordance with the provisions of chapter 13. In conducting investigations and assessments pursuant to this section, the notice required by section 13.04, subdivision 2, need not be provided to a minor under the age of ten who is the alleged victim of abuse or neglect. An individual subject of a record shall have access to the record in accordance with those sections, except that the name of the reporter shall be confidential while the report is under assessment or investigation except as otherwise permitted by this subdivision. Any person conducting an investigation or assessment under this section who intentionally discloses the identity of a reporter prior to the completion of the investigation or assessment is guilty of a misdemeanor. After the assessment or investigation is completed, the name of the reporter shall be confidential. The subject of the report may compel disclosure of the name of the reporter only with the consent of the reporter or upon a written finding by the court that the report was false and that there is evidence that the report was made in bad faith. This subdivision does not alter disclosure responsibilities or obligations under the rules of criminal procedure.

Subd. 11a. [*Disclosure of information not required in certain cases.*] When interviewing a minor under subdivision 10, an individual does not include the parent or guardian of the minor for purposes of section 13.04, subdivision 2, when the parent or guardian is the alleged perpetrator of the abuse or neglect.

Subd. 11b. [*Data received from law enforcement.*] Active law enforcement investigative data received by a local welfare agency under this section are confidential data on individuals.

When this data become inactive in the law enforcement agency, the data are private data on individuals.

Subd. 11c. [*Records maintained.*] Notwithstanding sections 138.163 and 138.17, records maintained or records derived from reports of abuse by local welfare agencies, county sheriffs or police departments, or schools under this section shall be destroyed as provided in paragraphs (a) to (c) by the responsible authority.

(a) If upon assessment or investigation there is no determination of maltreatment or the need for child protective services, the records may be maintained for a period of four years. After the individual alleged to have maltreated a child is notified under subdivision 10f of the determinations at the conclusion of the assessment or investigation, upon that individual's request, records shall be destroyed within 30 days.

(b) All records relating to reports which, upon assessment or investigation, indicate either maltreatment or a need for child protective services shall be destroyed seven years after the date of the final entry in the case record.

(c) All records regarding a report of maltreatment, including any notification of intent to interview which was received by a school under subdivision 10, paragraph (d), shall be destroyed by the school when ordered to do so by the agency conducting the assessment or investigation. The agency shall order the destruction of the notification when other records relating to the report under investigation or assessment are destroyed under this subdivision.

Subd. 12. [*Duties of facility operators.*] Any operator, employee, or volunteer worker at any facility who intentionally neglects, physically abuses, or sexually abuses any child in the care of that facility may be charged with a violation of section 609.255, 609.377, or 609.378. Any operator of a facility who

knowingly permits conditions to exist which result in neglect, physical abuse, or sexual abuse of a child in the care of that facility may be charged with a violation of section 609.23 or 609.378.